IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1157

ROBERT M. DUPAS, JR.,
Petitioner,

versus

CITY OF NEW ORLEANS,
TRAVELERS INSURANCE COMPANY, and
WILLIAM O. BROWN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA AND THE LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

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January 23, 1979

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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The petitioner, Robert M. Dupas, Jr., prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeal for the Fourth Circuit, State of Louisiana, rendered in these proceedings on June 30, 1978, and the denial of petitioner's Petition for Writ of Certiorari rendered in these proceedings by the Supreme Court of Louisiana on October 26, 1978.

OPINIONS BELOW

The judgment and opinion of the Louisiana Court of Appeal is reported in *Dupas v. City of New Orleans*, 361 So.2d 911 (La. App. 1978), reh. den., and appears at Appendix A, *infra.*, pp. 1a-11a. The Supreme Court of Louisiana's denial without opinion of petitioner's Petition for Writ of Certiorari is reported in *Dupas v. City of New Orleans*, 364 So.2d 121 (La. 1978), and appears at Appendix D, *infra.*, p. 91a.

JURISDICTION

The order or judgment of the Supreme Court of Louisiana was entered October 26, 1978. See, Appendix D, *infra.*, p. 91a. This petition for writ of certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Is an intermediate state court litigant seeking damages denied due process of law and the equal protection of the law, as guaranteed by the Fourteenth Amendment of the United States Constitution, if the state court awards a grossly inadequate amount on the basis of a rule of law or test that has no foundation in law, that has never been applied in any other case, and that is contrary to the rules of law and the tests laid down by the highest court of the State, and the highest court of the State denies a writ for review?

2. Is an intermediate state court judgment, with writs denied by the highest state court, which is rendered on the basis of reasons, rationale, and theories that violate the State constitution repugnant to the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

3. Is an intermediate state court judgment, with writs denied by the highest state court, which is rendered on the basis of the reasons, rationale, and theories, as set forth is Question 2, above, aside from State constitutional considerations, in and of itself violative of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 3, Louisiana State Constitution of 1974:

"No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations . . . ."

Article 1, Section 22, Louisiana State Constitution of 1974:

"All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are as follows:

This is a suit for damages to compensate the petitioner, Robert M. Dupas, Jr., for unusually serious and permanent personal injuries sustained as the result of being struck by an unlighted New Orleans Police Department vehicle driven by Officer William O. Brown on the night of October 15, 1973.

Defendants in the suit are the City of New Orleans, owner of the police vehicle and employer of Brown; Brown, the driver of the police vehicle; and Travelers Insurance Company, the liability insurer for the City of New Orleans.

Petitioner suffered severe brain damage, lost eight to ten percent of his brain in surgery, and is permanently disabled.

On April 19, 1976, after trial on the merits before a judge, the trial court rendered judgment in favor of defendants, dismissing petitioner's suit. Petitioner appealed to the Louisiana Court of Appeal for the Fourth Circuit on April 22, 1976.

On May 17, 1977, the Court of Appeal affirmed the trial court. *Dupas v. City of New Orleans*, 245 So.2d 322 (4th Cir. 1977). Petitioner timely filed an application for rehearing, which was denied on June 7, 1977.

To the judgment of the Court of Appeal petitioner filed a petition for writ of certiorari in the Supreme Court of Louisiana, which was granted.

On January 30, 1978, the Supreme Court of Louisiana reversed the judgments of the district court and the Court of Appeal insofar as they dismissed petitioner's demand, and remanded the case to the Court of Appeal to fix the amount of damages to which petitioner is entitled. *Dupas v. City of New Orleans*, 354 So.2d 1311 (La. 1978).

On June 30, 1978, the Court of Appeal rendered judgment in favor of petitioner in the amounts of $50,000.00 for general damages, $9,874.48 for lost wages, $104,249.17 for impairment of earning capacity, and various amounts for expenses for hospitals, physicians, future speech therapy, and rehabilitation, all totalling $172,461.60. *Dupas v. City of New Orleans*, 361 So.2d 911 (La. App. 1978).

Petitioner timely filed an application for rehearing, which was denied on September 12, 1978. Petitioner's Petition For Writ Of Certiorari to the Supreme Court of Louisiana was denied without opinion on October 26, 1978. *Dupas v. City of New Orleans*, 364 So.2d 121 (La. 1978).

In his Petition For Writ Of Certiorari to the Supreme Court of Louisiana petitioner set forth in detail the questions of:

1. The violations by the Louisiana Court of Appeal of the provisions of Article 1, Sections 3 and 22, of the Louisiana State Constitution. See, Petition For Writ Of Certiorari, Appendix C, *infra.*, pp. 42a, 75a-76a, 82a, and 87a.

2. The violations of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. See Petition For Writ Of Certiorari, footnotes 3, 11, 13, and 15, Appendix C, *infra.*, pp. 42a, 76a, 82a, and 87a.

REASONS FOR GRANTING THE WRIT

Petitioner brought suit for damages for personal injuries. The Louisiana Court of Appeal for the Fourth Circuit, in awarding an unusually low amount for general damages as compensation for the brain injury and residuals that petitioner sustained, rendered an Opinion and judgment based upon the court's finding that Louisiana courts apply the "ordinary man" test in determining the amount of an award in personal injury suits. *Dupas v. City of New Orleans*, 361 So.2d 911, 913 (La. App. 1978).

This statement by the Court of Appeal is an erroneous conclusion of law for there is no statute or case that petitioner could find in his research that even suggests such a rule, and certainly not one that establishes this rule, nor did the Court of Appeal cite any case or statute in support of its pronouncement.

To the contrary the well-settled rule is just the opposite of the rule laid down by the Court of Appeal. The Supreme Court of Louisiana has stated over and over that there is no rule or standard of law fixing or establishing the amount of the recovery, and that each case must be evaluated according to its own peculiar facts and circumstances as to the damage caused by the type of injury. *Anderson v. Welding Testing Laboratory, Inc.*, 304 So.2d 351, 352 (La. 1974); *Boutte v. Hargrove*, 290 So.2d 319 (La. 1974); *Miller v. Thomas*, 246 So.2d 16, 18 (La. 1971); *Lomenick v. Schoeffler*, 200 So.2d 127, 129 (La.

1969); *Ballard v. National Indemnity Co. of Omaha, Neb.*, 169 So.2d 64, 67 (La. 1964); *Gaspard v. LeMaire*, 158 So.2d 149, 160 (La. 1963).

Each of the four Louisiana courts of appeal has followed this rule. See, *e.g.*, *Profit v. Linn*, 346 So.2d 253, 256 (1st Cir. 1977); *Brouillette v. State, Through Dept. of Highways*, 275 So.2d 196, 199 (3rd Cir. 1973); *Riley v. Frantz*, 253 So.2d 237, 241 (4th Cir. 1971); *Burton v. Southwestern Gas & Electric Company*, 107 So.2d 62, 66 (2nd Cir. 1958); *McNulty v. Toye Bros. Yellow Cab Co.*, 73 So.2d 23, 30 (Orl. 1954); *Grissom v. Heard*, 47 So.2d 108, 109 (1st Cir. 1950); *Barthelemy v. Phoenix Ins. Co.*, 226 So.2d 603, 607 (3rd Cir. 1969), writ ref.

The Supreme Court of Louisiana has said, recently and as far back as 1963, that the Louisiana courts of appeal have a constitutional duty to render judgment on quantum based on the merits of the case. *Corollo v. Wilson*, 353 So.2d 249, 252 (La. 1977); *Gaspard v. LeMaire*, 158 So.2d 149, 159 (La. 1963).

And in *Gaspard, supra.*, the Supreme Court of Louisiana specifically rejected the prevailing tendency at that time of the trial and intermediate courts to award uniform amounts in all cases with similar injuries, observing that such a result is tantamount to setting up a schedule for injuries in a personal injury case as there is in workmen's compensation cases. *Gaspard v. LeMaire*, 158 So.2d 149, 159 (La. 1963).

What the Court of Appeal essentially has said, then, is that an injured person shall not recover his own specific damages for his own specific injuries, but will recover the amount that a fictitious, ordinary man would have recovered for like injuries.

Then the Court of Appeal, effectively, goes even further, by implying that the injured person's lifestyle is compared with the fictitious, ordinary man's lifestyle, and if not the same, then the award should not be the same as the award the ordinary man would have received for like injuries.

Conceivably, the award could be less or higher than the ordinary man's award, depending on whether the injured person's lifestyle was comparatively less or comparatively higher than the ordinary man's lifestyle.

In the instant case the Court of Appeal found that petitioner's lifestyle was less than the lifestyle of the ordinary man, and petitioner's argument is in reference to that finding. Petitioner suggests, however, that his argument set forth herein applies equally to the instance where a defendant is appealing a higher award than the ordinary man would have received in a case where the trial court or court of appeal found that the injured person's lifestyle was comparatively higher than the ordinary man's lifestyle and for that reason awarded the injured person a higher amount than the ordinary man with like injuries would have received.

Without stating so, and without indicating the basis for doing so, the Court of Appeal then effectively reduced the award it would have given to the ordinary man by a certain factor, and made that award its award to petitioner.

Some of the findings that the Court of Appeal considered in determining the amount of damages are as follows:

1. Petitioner had been convicted of a felony.

2. Petitioner supported himself by theft and burglary in between his periods of gainful employment.

3. Petitioner on one occasion pistol-whipped his wife.

4. Petitioner on one occasion threatened to kill himself, his wife, and his two children.

5. Petitioner had been committed to the Louisiana State Hospital at Mandeville for psychiatric treatment.

6. Petitioner on one occasion had been arrested for theft.

7. Petitioner had been a drug addict.

8. Petitioner only worked intermittently at best.

Dupas v. City of New Orleans, 361 So.2d 911, 914 (La. App. 1978).

The Court of Appeal further found that from some abstract point of view the change in petitioner's lifestyle brought about by his injuries was an improvement insofar as society in general was concerned. *Ibid.*

Discriminations of an unusual character especially suggest that careful consideration should be given to determine whether they are obnoxious to constitutional provisions. *Morey v. Doud*, 354 U.S. 457, 464 (1956).

The Constitution of the United States precludes irrational discrimination as between persons or groups of persons in the incidence of the law. *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).

Where a law is applied or administered by public authority with an unequal hand, so as to make unjust and illegal discriminations between persons of similar circumstances, the denial of equal justice is within the prohibition of the Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1885).

A state may not draw a line of classification which constitutes an invidious discrimination against a particular class or is not a rational one. *Levy v. Louisiana*, 391 U.S. 68 (1968).

Invidious discrimination is a classification which is arbitrary, irrational, and not reasonably related to a legitimate purpose. *McLaughlin v. Florida*, 379 U.S. 184, 190-1 (1964).

If a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, the judgment may be in violation of the Fourteenth Amendment. *Wood v. Conneaut Lake Park, Inc.*, 386 F.2d 121, 124 (CA 3, 1967), cert. den., 391 U.S. 907 (1968).

Equal protection to all is the basic principle upon which justice under law rests. *Pierre v. Louisiana*, 306 U.S. 354, 358 (1938).

The Louisiana jurisprudence conforms with the foregoing principles laid down by this Court. See, *e.g.*, *Foster v. Hampton*, 352 So.2d 197, 202 (La. 1977), citing *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Succession of Robins*, 349 So.2d 276, 278 (La. 1977); and *Louisiana & Arkansas Railway Company v. Goslin*, 246 So.2d 852, 854 (La. 1971).

From a reading of the foregoing cases, it seems clear that the Court of Appeal, in determining the amount of general damages, should not have considered the fact that petitioner "beat" his wife, or threatened to kill himself, his wife and his child, even if these are true facts. Nor should the Court of Appeal have considered the fact that petitioner had been convicted of a felony, and that he had been arrested for theft.

Nor should the Court of Appeal have considered the fact, even if true, that petitioner used drugs. His anti-social behavior, even if true, which the Court of Appeal pointed out specifically, should not have been considered. Nor should the Court of Appeal have considered the fact that petitioner had been committed to a mental institution, even though voluntarily and for a short period.

All of the foregoing are manifestations of petitioner's beliefs, culture, affiliations, and physical condition. The Fourteenth Amendment and the Louisiana Constitution mandate that the outcome of a lawsuit must not be affected by a party's beliefs, culture, affiliations, and physical condition.

The Court of Appeal, however, did just that. It found that petitioner's lifestyle was not that of the ordinary man. It then effectively proceeded to penalize petitioner for not being the same as the ordinary man by reducing the amount of damages.

The Court of Appeal next inquired into petitioner's life history, covering the eleven and one-half years prior to the accident.

The Court of Appeal found the following:

1. That petitioner had been discharged in 1963 for being absent from work.

2. That petitioner worked for numerous employers for a short period of time.

3. That petitioner supported himself by theft and burglary.

4. That petitioner had been committed to the Louisiana State Hospital at Mandeville.

5. That petitioner had been a drug addict.

The Court of Appeal closed by stating in no uncertain terms that society is better off, now that petitioner is so severely injured and then awarded petitioner only $50,000.00 in general damages. This grossly low award is in spite of its findings of permanent mental and physical disabilities, and its finding that petitioner would be handicapped throughout his life span.

Although prior awards are not binding under Louisiana law, they will show just how much the Court of Appeal penalized petitioner for his beliefs, culture, affiliations, and physical condition. Some Louisiana cases awarded persons $65,000.00 - $100,000.00 for injuries that were much less severe than petitioner's injuries were, or were not permanent, as petitioner's are.

For example, plaintiff was awarded $65,000.00 in general damages in *York v. Sedotal*, 281 So.2d 170 (4th Cir. 1973). Plaintiff's injuries were a right shoulder fracture and dislocation, weakness in right hand and arm, and mental depression.

In *Edwards v. Sims*, 294 So.2d 611 (4th Cir. 1974), plaintiff suffered a herniated disc, took a less paying job, curtailed his activities, and underwent a lumbar laminectomy. Plaintiff was awarded $60,000.00 in general damages.

In *Wallace v. Pan American Fire Cas. Co.*, 352 So 2d 1048 (3rd Cir. 1977), plaintiff suffered burns over most of his body and was hospitalized three months. Plaintiff was awarded $100,000.00 in general damages.

Other Louisiana cases show injured persons with injuries and residuals of a less serious nature than, or in some ways similar to petitioner's injuries and residuals, receiving $350,000.00 to $400,000.00 in general damages.

For example, in *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La. 1977), the plaintiff lost all four of his fingers of his right hand and part of his right palm. Plaintiff was awarded $350,000.00 in general damages.

And in *Faulk v. Power Rig Drilling Co.*, 348 So.2d 219 (3rd Cir. 1977), plaintiff suffered the amputation of part of the right frontal lobe of his brain which affected his personality, judgment, behavior, and ability to get along with people. His injury, however, did not affect his reading, writing, or motor skills, as did petitioner's injuries. Plaintiff was awarded $375,000.00 in general damages.

In *Corollo v. Wilson*, 353 So.2d 249 (La. 1977), a seven year old boy suffered a brain stem injury, had been in a coma, had permanent reduction of intellectual power, had an alteration of his personality, and was 100% disabled in his left arm and 70% in his left leg. He was awarded $600,000.00 in damages, of which about $400,000.00 was for general damages.

Throughout its Opinion, the Court of Appeal referred to petitioner's lifestyle, conviction, arrest, incarceration in the Louisiana State Penitentiary, commitment to a state mental institution, pistol-whipping his wife, threatening his children, and use of drugs.

Thus, this Court need not speculate on the rationale or thinking behind the Court of Appeal's low award for general damages for the Court of Appeal specified and set forth its exact thoughts, feelings, and reasoning on why it awarded the amount it did.

In examining these feelings and thoughts and the Court of Appeal's reasoning, it should be seen that the provisions of the Fourteenth Amendment of the United States Constitution, and Article 1, Sections 3 and 22, of the Louisiana Constitution of 1974 were violated by the Court of Appeal, because clearly, the only reason the Court of Appeal awarded petitioner only $50,000.00 for general damages, and not a higher award, was because it disapproved of petitioner's beliefs, culture, affiliations, and physical condition. Disregarding these factors, the Court of Appeal undoubtedly would have awarded him much more than that.

Therefore, the Court of Appeal in determining the amount of award based its assessment of damages on erroneous, immaterial, and irrelevant facts of such a nature, that in so doing, it violated the clear provisions of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and Article 1, Sections 3 and 22, of the Louisiana Constitution of 1974.

In denying petitioner's Petition For Writ Of Certiorari the Supreme Court of Louisiana failed to correct obvious state action in the form of a judicial judgment which is repugnant to the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and Article 1, Sections 3 and 22, of the Louisiana State Constitution of 1974.

There is nothing in the Louisiana statutes and jurisprudence which makes it essential, nor is there any compelling reason, to penalize one of low wealth, low intelligence, low morals, etc. in assessing general damages for pain and suffering in personal injury cases.

To the contrary, the opposite is true. The Louisiana cases hold that there is no standard or test, and that each case is decided on its own merits. Further, the Louisiana State Constitution of 1974 and the Louisiana cases hold that the Louisiana courts shall decide matters impartially, without regard to a litigant's beliefs, affiliations, culture, or physical condition.

The judgment of the Louisiana Court of Appeal and the Supreme Court of Louisiana's denial of petitioner's Petition For Writ Of Certiorari violate the constitutional prohibition of laws that unreasonably discriminate against a person because of his economic status, culture, and morals.

The Louisiana Court of Appeal has so far departed from the well-settled rules and tests applicable to damages in tort law which have been laid down by the Louisiana statutes and the Supreme Court of Louisiana, and the Supreme Court of Louisiana has so far sanctioned such a departure by the Court of Appeal by denying petitioner's Petition For Writ, as to call for an exercise of this Court's power of supervision. See, Rule 19, Supreme Court Rules.

The unjust and unreasonable rules and tests established by the Court of Appeal in this case have never been followed before, and petitioner ventures to say, will never be followed again.

These rules and tests have been applied only to petitioner. The Louisiana courts have never applied them to anyone before him, and will never apply them to anyone after him.

Clearly, petitioner has been the victim of invidious discrimination of a shocking nature.

Where a state court's judgment is inconsistent with its own prior rulings, this Court has taken jurisdiction

to entertain a petitioner's federal claim. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 455-6 (1958).

Similarly, this Court will examine a State course of judicial procedure and judgment to determine if a petitioner was afforded due process of law. See, *Hansberry v. Lee*, 311 U.S. 32 (1940).

CONCLUSION

The result and effect of the judgment of the Court of Appeal creates a classification of litigants for purposes of recovery in tort actions. There is no reasonable basis for the Court of Appeal's excluding petitioner from the benefit of all of the rules of law, statutes, and jurisprudence enjoyed by all other litigants in the State.

The rule of law and test, and the reasons, rationale, and theories established and advanced by the Court of Appeal in this case is such a departure from the Louisiana jurisprudence as to constitute invidious discrimination and is violative of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, as well as the Louisiana States Constitution of 1974, Article 1, Sections 3 and 22.

Petitioner submits that this case is a case over which this Court should take jurisdiction. For the reasons assigned above a writ of certiorari should issue to review the judgment and opinion of the Louisiana Court of

Appeal for the Fourth Circuit, and a writ of certiorari should issue to review the denial of petitioner's Petition For Writ Of Certiorari by the Supreme Court of Louisiana.

Respectfully submitted

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(504) 455-2132

January 23, 1979

CERTIFICATE

I certify that I served the foregoing Petition For Writ Of Certiorari on defendants by mailing or delivering three copies of same to James L. Selman, II, Esq., Attorney at Law, 28th Floor, 225 Baronne Bldg., New Orleans, Louisiana 70112, and the Office of the City Attorney, City of New Orleans, City Hall, 1300 Perdido St., New Orleans, Louisiana 70112, on January ____, 1979.

Gerald P. Aurillo

APPENDIX A

COURT OF APPEAL — FOURTH CIRCUIT
STATE OF LOUISIANA

ROBERT M. DUPAS, JR.

versus No. 8060

CITY OF NEW ORLEANS,
TRAVELERS INSURANCE COMPANY and
WILLIAM O. BROWN

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, NO. 581-139, HON. ADRIAN B. DUPLANTIER, JR., JUDGE.

JOHN C. BOUTALL,
JUDGE

ON REMAND FOR DAMAGES

(Court composed of Judges L. Julian Samuel, James C. Gulotta and John C. Boutall.)

GERALD P. AURILLO,
COUNSEL FOR ROBERT M. DUPAS, JR.,
PLAINTIFF-APPELLANT.

JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE and JAMES L. SELMAN, II

COUNSEL FOR TRAVELERS INS. CO. and CO-COUNSEL FOR CITY OF NEW ORLEANS and WILLIAM O. BROWN;

GERALD A. STEWART, ASST. CITY ATTORNEY
CO-COUNSEL FOR CITY OF NEW ORLEANS
and WILLIAM O. BROWN,
DEFENDANTS-APPELLEES.

DAMAGES FIXED IN RESPONSE TO REMAND

[1] Plaintiff, Robert M. Dupas, Jr., instituted suit seeking damages suffered by him when struck by an automobile owned by the City of New Orleans and operated by New Orleans Police Officer William O. Brown. Plaintiff sued the City of New Orleans, Brown, and Travelers Insurance Company, the liability insurer. The trial court found no liability and dismissed plaintiff's suit and we affirmed. Dupas v. City of New Orleans, 346 So.2d 322, (La.App. 4th Cir. 1977). The Supreme Court of Louisiana reversed the dismissal of plaintiff's demands and remanded the case to us in order to fix the damages to which plaintiff is entitled. Dupas v. City of New Orleans, 354 So.2d 1311 (La.1978).

The facts surrounding the accident are stated and discussed in those previous decisions. Suffice it to say that on October 15, 1973, Dupas, a pedestrian, was struck by the police vehicle and thrown on the hood of

the car. When the car stopped, Dupas rolled off of the hood onto the concrete pavement. As a result of this collision, Dupas suffered severe head injuries and it was noted that he was unconscious and bleeding from his ears and mouth.

Dupas was taken to Charity Hospital in a police emergency vehicle and was immediately examined by doctors there who determined that he was suffering a closed head injury with considerable brain [2] damage and needed immediate operation. Dr. David G. Kline, a neurosurgeon, carried out a partial lobectomy of the left temporal lobe of the brain, removing the most swollen and contused portion of the brain to allow room in the cranial cavity for the remainder of the brain. Dr. Kline estimated that he removed a portion of the brain approximately the size of his fist and that it constituted approximately 8 to 10% of the brain overall. Dr. Kline noted that the brain injury was not confined to that portion that he removed, but that there was overall damage to the brain, which was the main cause of the overall lasting effects suffered by Dupas.

The operation was successful, and Dupas remained in a coma for the next several days in critical condition. Under Dr. Kline's treatment, he regained consciousness, and it was determined that he suffered right-sided hemiplegia or paralysis, and that he had a significant degree of aphasia, a speech impairment. Under continued care, plaintiff began a rather remarkable

recovery, reducing his right-sided hemiplegia to right-sided hemiparesis and showed continued improvement in his ability to speak.

On November 6, 1973 Dupas was transferred from Charity Hospital to Hotel Dieu for treatment and remained there until December 16, 1973. While there he was treated mainly by Dr. Patricia Cook, a neurologist whose diagnosis was the same as Dr. Kline's and noted that Dupas was suffering from severe brain injuries, aphasia and right hemiparesis. Plaintiff's physical therapy was increased, and he continued to improve, gradually reducing the right-sided weakness and arkwardness and improving in speech.

From Hotel Dieu, Dupas was transferred to the L.S.U. School of Medicine Rehabilitative Center where he remained an inpatient for three months and continued improvement. He was then discharged as an inpatient and treated at the Center as an outpatient for five months subsequent.

[3] In October, 1974, Dupas was referred to Dr. Raeburn C. Llewellyn, a neurosurgeon, for evaluation and further treatment. He found that Dupas had an awkward gait, which affected his balance, spasticity in the lower limbs, some reduction of dexterity in the right arm and fingers, and that he exhibited a flattened personality, showing lack of interest in his surroundings and no inclination to inaugurate conversation or continue with one. His diagnosis was that Dupas was

suffering an organic brain syndrome based on severe brain damage as a result of the trauma. Dr. Llewellyn last saw plaintiff on March 18, 1976. On this occasion he found some slight improvement, but basically his condition remained the same with the exception that he noted some effect on the lower facial muscles of Dupas on the right side.

In the interim Dupas attended Dr. Max E. Johnson, a neurologist/psychiatrist for evaluation and treatment. Dr. Johnson also found that Dupas' speech was slurred and he had some trouble articulating. He was disoriented timewise, walked slowly and stiffly with his right leg and exhibited slow, awkward movements with his right arm. He too diagnosed that Dupas was suffering from a post-traumatic cerebral brain syndrome with expressive and sympatic aphasia, moderately severe intellectual and memory impairment, and personality changes. In connection with his treatment by his doctors during this period, Dupas was examined and tested by several psychologists and speech therapists, and beginning on December 3, 1975 undertook speech therapy at New Orleans Speech and Hearing Center.

In summary, the medical history of plaintiff is consistent from doctor to doctor and there is basic general agreement amongst them as to the cause of Dupas' injuries and the residuals he suffered. Plaintiff continues to have the right-sided weakness and awkwardness and the impairment in his speech and memory, to-

gether with a marked [4] personality change. The medical evidence is that he is incapacitated from work except under sheltered conditions with close supervision and that the only type of job he could possibly hold would be with some type of rehabilitative program. There is only a slight chance of improvement in his condition and that mainly in the area of his speech impairment. We conclude that he is presently disabled and will be permanently disabled for the rest of his life.

The problem that concerns us here is the fixing of damages for the injuries received and the resulting disability. In Louisiana damages are compensary in nature, and this case presents problems not ordinarily found in damage suits. Dupas' lifestyle prior to the injury was not that of the so-called "ordinary man" that courts usually use as a standard for a comparison in assessing damages.

The evidence shows that prior to the accident, Dupas was able to work, and that after the accident he is not able to work and produce income. At the time of the accident Dupas was unemployed, but had been employed by Avondale Shipyards, Inc., prior to the accident from June 26, 1973 through August 7, 1973 as an electrician's helper at the rate of $3.35 per hour. Plaintiff asks us to use this most recent employment as a basis for computing lost wages. He introduced evidence to show that at this rate a normal work year would produce a total income of $8,929.96 per year. He would thus have lost from the date of the accident, October

15, 1973 to January 1, 1976, wages to the extent of $19,748.95. His age was 27 at the time of the accident and his work life expectancy would have been 35.1 years to age 62.1. His life expectancy was computed at 42.9 years to age 69.9. Using various formulae involving future increase in productivity, inflation rate and discount rate, his loss of future income would range from a low of $142,009.70 to a maximum of $377,942.52. However, we cannot agree with any of the proposed amounts.

[5] In computing damages in this case we find it necessary to rely upon the prior life history of Dupas because we believe it demonstrates a more accurate picture of his actual income loss. His work record apparently began with Avondale from April 12, 1962 to January 29, 1963 when he was discharged for having been absent from work. This was to form a typical pattern of his work history and for the next ten years prior to the accident he worked for numerous employers for a short period of time before leaving for one reason or another. His work history can perhaps be best summarized by his tax returns which were introduced into evidence and show that in 1966 he earned $1,085.16 at four different places of employment; that in 1967 he earned $1,335.95 at three different places of employment; that in 1968 he earned $1,939.78 at one place of employment; that in 1969 he earned $2,234.36 at one place of employment; that in 1972 he earned $1,-071.25 at two different places of employment; that in 1973 during the nine months prior to the accident, he earned $3,518.03 at three different places of employment. The evidence further discloses that during the

earlier portion of that time, he was addicted to drugs and supported himself by theft and burglary in between the short periods of gainful employment. He was convicted of a felony and imprisoned at the Louisiana State Penitentiary. After his release, he continued this lifestyle, and was committed to the Louisiana State Hospital at Mandeville for psychiatric treatment, for a manic-depressive type of schizophrenia. At the time he was in Mandeville, a detainer was placed upon him by authorities in Jefferson Parish for possession of stolen property. It should be noted that his commitment to Mandeville was preceeded by an episode wherein he threatened to kill himself, his wife and children, and pistol whipped his wife.

Whether his prior problems were due to drug addiction, or whether his drug addiction was merely a symptom of other deeper psychological problems, we do not know. Suffice it to say that his life [6] style was such that he only worked intermittently at best. We note, for example, that in September, 1970, he was hospitalized at Charity Hospital for viral (serum) hepatitis which he apparently contracted from an unsterile syringe used for a Heroin injection, causing his incapacity for some time. Nevertheless, in his favor we must state that the evidence indicates an attempt on his part to rehabilitate himself in the year prior to the accident, which was partially successful. Coupled with his work history, we further consider that Dupas, by education and training, could only perform general

labor or semi-skilled labor. While it is possible that by diligent application, he could have increased his skills, his life history does not indicate the probability of that occurring.

Considering these factors enumerated above, we cannot fix Dupas' loss of wages with preciseness. Based upon his most recent work experience prior to the accident, perhaps his most favorable year, we can only conclude that he would produce only one half of the income per year that he was capable of producing, and instead of using his yearly estimated full time income from Avondale of $8,929.96 per year, we would fix his loss of income at $4,464.98[1] annually. Accordingly, we would award him lost wages for the period October 15, 1973 to January 1, 1976 in the amount of $9,874.48. In fixing loss from future wages, we accept his work-life expectancy to age 62.1 and consider his income would increase by 3% per year with a discount factor of 5% per year, and reach a total of $104,249.17.

We next approach the measure of general damages that should be awarded to Dupas as compensation for the injuries he suffered. We have already discussed his medical history caused by the severe brain injuries he received, resulting in an organic brain syndrome, [7] aphasia and right hemiparesis, demonstrating awkwardness of gait and use of the right side, lack of dexterity, lack of interest in his surroundings and a

1 This figure represents 1/2 of his estimated income and is consistent with his partial earnings for the year reflected in his 1973 income tax return.

change in his activity pattern from an active person to a rather withdrawn, disinterested and retiring individual of low normal intelligence. We have also mentioned above his criminal and anti-social behavior. While it might be said from some abstract point of view, that the change in Dupas' lifestyle is an improvement insofar as society in general is concerned, nevertheless we note that his disabilities are such that he will be handicapped throughout the rest of his life and that he will need the care of someone watching over him in general. We are not disposed to award him any amount for his alleged loss of cohabitation and companionship of his wife, because the evidence shows that his previous lifestyle was such that he enjoyed no settled family life. We also note that the nature of his injuries is such that he suffered very little pain in the initial stages of his treatment, and he suffers none thereafter. We do consider that his residual disabilities will handicap him throughout his life span. We consider the sum of $50,000 to be adequate compensation.

In setting his special damages, we would award the following:

> Hospital expenses including $2,879.65 for Charity Hospital, a total of $5,587.95; expenses of physicians and surgeons, $875.00; rehabilitation expenses, $585.00. Additionally we would note that the evidence indicates that he should continue his therapy consisting of three sessions a week at $15.00 each, in the amount of $2,340.00.

In this case there was testimony from a number of expert witnesses. We award the sum of $150.00 each for Dr. David G. Kline, Dr. Max E. Johnson, Dr. Patricia S. Cook, Dr. Robert A. McFarland and Dr. Raeburn C. Llewellyn. We award $75.00 each to Dr. Olin K. Dart, Dr. Jack Rosen, Dr. John Kullen, and Dr. John W. Chisholm. [8] These amounts are taxed as costs. Finally we note that the liability of Travelers Insurance Company was stipulated to be the amount of its policy, $25,000.

For the reasons above assigned, IT IS ORDERED, ADJUDGED and DECREED that there is judgment herein in favor of Robert M. Dupas, Jr. and against the defendants, William O. Brown, City of New Orleans and Travelers Insurance Company, in solido, in the amount of $25,000 and that there be further judgment against William O. Brown and the City of New Orleans in solido in the amount of $148,511.60, all amounts with legal interest from date of judicial demand until paid. The expert fees are taxable as costs, and all costs are assessed against the above named defendants, including the City of New Orleans to the extent provided by law.

Damages fixed in response to remand.

Dated: June 30, 1978

APPENDIX B

APPLICATION FOR HEARING

(Number and Title Omitted)

Robert M. Dupas, Jr., plaintiff-appellant-applicant, respectfully submits that the opinion of this Court rendered on June 30, 1978, wherein the Court rendered judgment in favor of plaintiff-appellant in the amount of $173,511.60, is erroneous, contrary to law and prejudicial to plaintiff for the following reasons:

1.

The Court erred in awarding only $50,000.00 for general damages.

2.

The Court erred in considering Dupas' conviction and incarceration in the Louisiana State Penitentiary for burglary in its determination of the amount of lost wages, impaired earning capacity, and general damages.

3.

The Court erred in considering Dupas' previous arrest for possession of stolen property in its determination of the amount of lost wages, impaired earning capacity, and general damages.

4.

The Court erred in finding that Dupas suffers no pain after the initial stages after the accident.

5.

The Court erred in finding that Dupas has suffered no mental pain.

6.

The Court erred in considering Dupas' "lifestyle" dating back as far as ten (10) years before the accident in considering its award for lost wages, impaired earning capacity, and general damages.

7.

The Court erred in not awarding higher amounts for future speech therapy, nursing care, and medical attention.

8.

The Court erred in not awarding an amount for loss of cohabitation and companionship of his wife and two children.

9.

The Court erred in considering Dupas' mental problems pre-dating this accident by several years in considering its award.

10.

The Court erred in finding that, during the early portion of his work history beginning in 1966, Dupas supported himself by theft and burglary.

WHEREFORE, applicant, Robert M. Dupas, Jr., prays that this Court grant him a rehearing and reargument and after due proceedings that it amend its Judgment rendered on June 30, 1978, awarding damages, and increase the award to Robert M. Dupas, Jr.

Respectfully submitted,

/s/GERALD P. AURILLO
Gerald P. Aurillo
Attorney for Plaintiff-
Appellant, Robert M.
Dupas, Jr.
3332 N. Woodlawn Avenue
Metairie, Louisiana 70002
455-2132

New Orleans, June 30, 1978

APPENDIX C

SUPREME COURT OF LOUISIANA

NO. 63207

ROBERT M. DUPAS, JR.,
Plaintiff-Appellant

versus

CITY OF NEW ORLEANS,
TRAVELERS INSURANCE COMPANY,
WILLIAM O. BROWN,
Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI OR REVIEW OR FOR A REMEDIAL WRIT FILED BY ROBERT M. DUPAS, JR. DIRECTED TO THE HONORABLE JUDGES OF THE COURT OF APPEAL, FOURTH CIRCUIT
NO. 8060

GERALD P. AURILLO
Attorney For Plaintiff-
Appellant, Robert M.
Dupas, Jr.
3332 N. Woodlawn Avenue
Metairie, Louisiana 70002
455-2132

New Orleans
October 10, 1978

[1] INDEX

[4] TABLE OF AUTHORITIES

CASES:

TEXTS:

[6] SUPREME COURT OF LOUISIANA

No.

ROBERT M. DUPAS, JR.,
Plaintiff-Appellant

versus

CITY OF NEW ORLEANS,
TRAVELERS INSURANCE COMPANY
and WILLIAM O. BROWN,
Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI OR REVIEW OR FOR A REMEDIAL WRIT

The petition of Robert M. Dupas, Jr., plaintiff-appellant, in a cause entitled "Robert M. Dupas, Jr. vs. City of New Orleans, Travelers Insurance Company, and William O. Brown," Docket No. 8060, lately pending in the Court of Appeal for the Fourth Circuit, on remand by judgment of this Court with respect represents that plaintiff-appellant is aggrieved by the judgment of the Court of Appeal for the Fourth Circuit and is entitled to have this Court review that judgment.

STATEMENT OF THE CASE

This is a suit for damages to compensate the plaintiff-appellant, Robert M. Dupas, Jr. (hereafter

called "Dupas"), for unusually serious and permanent personal injuries sustained as a result of being struck by an unlighted New Orleans Police Department vehicle driven by Officer William O. Brown (hereafter called "Brown") on the night of October 15, 1973.

Defendants in the suit are the City of New Orleans, owner of the police vehicle and employer of Brown; Brown, the driver of the police vehicle; and Travelers Insurance Company, the liability insurer for the City of New Orleans.

On April 19, 1976, after trial on the merits before a judge, the trial court rendered judgment in favor of defendants, dismissing Dupas' suit. Dupas appealed to the Court of Appeal for the Fourth Circuit on April 22, 1976.

On May 17, 1977, the Court of Appeal affirmed the trial court *Dupas v. City of New Orleans*, 346 So.2d 322 (4th Cir. 1977). Dupas timely filed an application for rehearing, which was denied on June 7, 1977.

To the judgment of the Court of Appeal Dupas filed a petition for writ of certiorari in this Court, which was granted.

[7] Thereafter, this Court reversed the judgments of the district court and of the Court of Appeal insofar as they dismissed Dupas' demand, and remanded the case to the Court of Appeal to fix the amount of damages to

which Dupas is entitled. *Dupas v. City of New Orleans*, 354 So.2d 1311 (La. 1978).

On June 30, 1978, the Court of Appeal rendered judgment in favor of Dupas in the amounts of $50,000.00 for general damages, $9,874.48 for lost wages, $104,249.17 for impairment of earning capacity, and various amounts for expenses for hospitals, physicians, future speech therapy, and rehabilitation, all totaling $172,461.60.

Dupas timely filed an application for rehearing, which was denied on September 12, 1978.

To this judgment of the Court of Appeal Dupas now files this Petition For Writ of Certiorari Or For A Remedial Writ (hereafter called "Petition").

FACTS

The essential facts necessary to set forth the issues and questions of law are as follows:

Introduction

Dupas quit public school in the sixth grade. He enrolled at Colton school at night for additional schooling, (Transcript, p. 137),[1] and in June, 1972, he

1 Hereinafter the trial transcript is "Tr.", except that Volume V was transcribed by a different court reporter and begins with page 1. In referring to this volume Tr. will be followed by V; (*E.g.*, Tr. V-108-11).

successfully passed the California test which qualified him to take the General Education Development (GED) test. His rankings were as follows:

1. reading — 13.0 (between a high school senior and the first year of college)

2. arithmetic — 12.3 (middle high school senior)

3. language — 13.4 (middle first year college)

(Tr. 139-140, 460).

That same month Dupas passed the GED test and received his High School Equivalency Diploma. (Tr. 137, V-31, V-64) see, Exhs. P-13, 15, 16, and 17). Dupas did quite well on the GED test. (Tr. 130).

[8] An individual who passes the GED in this state can hold his own with well over 90% of the individuals who graduate from a regular high school. (Tr. 131; see also, comments of Dr. John Chisholm, of Louisiana State University, Tr. 564).

A high school diploma is required for admission to Delgado College. Delgado College accepts a High School Equivalency Diploma in place of a regular high school diploma. (Tr. 133).

Dupas entered Delgado College on July 10, 1972, in the second Summer Session, completing a mathematics

course on August 18, 1972, with a grade of "A." On August 28, 1972, he began the Fall Session in drafting workshop and completed that course on December 22, 1972, with a grade of "D." (See Exh. P-22). Dr. Olin K. Dart, Jr., who was qualified and accepted by the trial court as an expert in the field of surveying and engineering graphics, (Tr. 304, 309), classified Dupas' mechanical drawings while at Delgado as "slightly above average." (Tr. 356-7). (See, Exh. P-54A-L, P-55).

Dupas worked as a deliveryman for Ives Business Forms, Inc. from July 25, 1969, to July 20, 1970, starting at $1.75 an hour and raised a month later to $2.00 an hour, and then on January 15, 1970, to $2.10 an hour. His pay raises were based on satisfactory performance. (Tr. 259-62). (See, Exh. P-19). Mr. Saunders, of Ives Business Forms, Inc., remembered an incident where Dupas had fixed Mr. Saunders' camera. (Tr. 262-3).

While attending Delgado College, Dupas was employed by Cozzo Electric Company (Joseph E. Cozzo, Jr.) until March 1, 1973, when Dupas began working as an electrician's helper for Halter Marine Service, Inc., earning $2.60 an hour. He left Halter's employment on June 26, 1973, to work for Avondale Shipyard, Inc. as an electrician's helper, earning $3.35 an hour. He left Avondale's employment on August 7, 1973. (Tr. V-31-2; see, Exh. P-20, 21 and 36).

Dupas left Avondale to return to Delgado College in September, 1973, but could not go back to school.

Therefore, he was seeking employment and was applying for a job until he could return to [9] school in the January, 1974, term. (Tr. V-42-4, V-74).

On October 15, 1973, the day of this accident, Dupas went to the Louisiana State Employment Service in New Orleans, Louisiana, to seek job placement. He was to return to the Louisiana State Employment Service on October 22, 1973, for an interview. (Tr. V-21-3, V-74). See, Exh. P-48.

Dupas will never keep that appointment.

Prior to this accident on October 15, 1973, Dupas was a 27 year old white male, in good health and enjoying the normal pleasures of married life and the companionship of two children, ages 6 and 2. He went to church on Sundays, and took his wife and children places. (Tr. V-27).

He liked fishing, crabbing, hunting, going to the drive-in, going to the zoo and circus, drafting, and reading. (Tr. 219-21, V-26-7, V-59, V-60-1, V-64). He did things with his wife and children. (Tr. 221-2, V-61). Dupas helped his daughter with her homework. (Tr. V-26). He talked a lot before the accident. (Tr. 220, V-60-1). He displayed an interest in girls and women, and had a lot of friends. (Tr. V-59-61). Dupas read extensively, and could talk about any subject, especially about animals and the earth. (Tr. V-64).

He had every reasonable expectation of living out his life in a normal way, earning a living at a regularly increasing rate, raising his standard of living as he grew older and earned more, and seeing his children grow and do well in life, all without the physical and mental pain and suffering he has endured and will continue to endure for the rest of his life.

Now, Dupas lives with his parents, (Tr. V-21, V-61), his children are afraid of him, (Tr. V-28), and all he does is sit around the house listening to stereo, and plays with the cat in the backyard. He doesn't go anywhere, and he has no friends. (Tr. 420, V-28, V-59-61).

Dupas knows there is something wrong with him. He knows he lost part of his brain. (Tr. 270). He stated he loves his wife [10] and children but that he cannot go back to living with them because, "Just can't do it. My head like it is, I can't do it." (pointing to his left temple). (Tr. V-78).

When Dr. Max Johnson asked how he felt, Dupas replied, "I feel down." (Tr. 273-4).

Dupas is aware that he cannot use his right arm very well. He is afraid to go outside because he might not be able to protect himself with his right arm. (Tr. 270, 277).

He complained that he felt that he is slow, and that he has trouble knowing how to say things. He does not

feel like doing much of anything, does not want to see people, friends, his wife, or his children. (Tr. 269-70).

Injuries and Treatment

Dupas' injuries and treatment are described on pp. 4-12 of his Original Brief On The Merits On Remand in the Court of Appeal (hereafter called "Original Brief").

Dupas' deficits and injuries are listed on pp. 12-14 of his Original Brief.

The following facts, however, quoted from the Court of Appeal Opinion rendered on June 30, 1978 (hereafter called "Opinion"), should be noted:

> "Dupas was taken to Charity Hospital in a police emergency vehicle and was immediately examined by doctors there who determined that he was suffering a closed head injury with considerable brain damage and needed immediate operation. Dr. David G. Kline, a neurosurgeon, carried out a partial lobectomy of the left temporal lobe of the brain, removing the most swollen and contused portion of the brain. Dr. Kline estimated that he removed a portion of the brain approximately the size of his fist and that it constituted approximately 8 to 10% of the brain overall. Dr. Kline noted that the brain injury was not con-

> fined to that portion that he removed, but that there was overall damage to the brain, which was the main cause of the overall lasting effects suffered by Dupas.
>
> "The operation was successful, and Dupas remained in a coma for the next several days in critical condition. Under Dr. Kline's treatment, he regained consciousness, and it was determined that he suffered right-sided hemiplegia or paralysis, and that he had a significant degree of aphasia, a speech impairment. Under continued care, plaintiff began a rather remarkable recovery, reducing his right-sided hemiplegia to right-sided hemiparesis and showed continued improvement in his ability to speak.
>
> [11] "On November 6, 1973, Dupas was transferred from Charity Hospital to Hotel Dieu for treatment and remained there until December 16, 1973. While there he was treated mainly by Dr. Patricia Cook, a neurologist whose diagnosis was the same as Dr. Kline's and noted that Dupas was suffering from severe brain injuries, aphasia and right hemiparesis. Plaintiff's physical therapy was increased, and he continued to improve, gradually reducing the right-sided weakness and awkwardness and improving in speech.

"From Hotel Dieu, Dupas was transferred to the L.S.U. School of Medicine Rehabilitative Center where he remained an inpatient for three months and continued improvement. He was then discharged as an inpatient and treated at the Center as an outpatient for five months subsequent.

"In October, 1974, Dupas was referred to Dr. Raeburn C. Llewellyn, a neurosurgeon, for evaluation and further treatment. He found that Dupas had an awkward gait, which affected his balance, spasticity in the lower limbs, some reduction of dexterity in the right arm and fingers, and that he exhibited a flattened personality, showing lack of interest in his surroundings and no inclination to inaugurate conversation or continue with one. His diagnosis was that Dupas was suffering an organic brain syndrome based on severe brain damage as a result of the trauma. Dr. Llewellyn last saw plaintiff on March 18, 1976. On this occasion he found some slight improvement, but basically his condition remained the same with the exception that he noted some effect on the lower facial muscles of Dupas on the right side.

"In the interim Dupas attended Dr. Max E. Johnson, a neurologist/psychiatrist for evaluation and treatment. Dr. Johnson also found that Dupas' speech was slurred and he

had some trouble articulating. He was disoriented timewise, walked slowly and stiffly with his right leg and exhibited slow, awkward movements with his right arm. He too diagnosed that Dupas was suffering from a post-traumatic cerebral brain syndrome with expressive and sympatic aphasia, moderately severe intellectual and memory impairment, and personality changes. In connection with his treatment by his doctors during this period, Dupas was examined and tested by several psychologists and speech therapists, and beginning on December 3, 1975, undertook speech therapy at New Orleans Speech and Hearing Center.

"In summary, the medical history of plaintiff is consistent from doctor to doctor and there is basic general agreement amongst them as to the cause of Dupas' injuries and the residuals he suffered. Plaintiff continues to have the right-sided weakness and awkwardness and the impairment in his speech and memory, together with a marked personality change. The medical evidence is that he is incapacitated from work except under sheltered conditions with close supervision and that the only type of job he could possibly hold would be with some type of rehabilitative program. There is only a slight chance of improvement in his condition and that mainly in

the area of his speech impairment. We conclude that he is presently disabled and will be permanently disabled for the rest of his life." (Opinion, pp. 1-4).

[12] *Loss Of Wages and Impairment Of Earning Capacity*

Dupas was age 27 at the time of the accident. (Tr. 547). Dupas' life expectancy is 42.9 years, or to age 69.9. (Tr. 548).

Dr. John W. Chisholm was qualified and accepted by the trial court as an expert in the field of economics and actuarial mathematics. (Tr. 545-7). He was given information on Dupas' employment and hourly wage history. (Tr. 549).

Utilizing the hourly wage of $3.35 per hour, which was Dupas' last hourly wage in August, 1973, Dr. Chisholm opined that Dupas' yearly income would be $8,929.96. Using the $8,929.96 yearly figure, Dr. Chisholm was of the opinion that the amount of Dupas' lost wages from the date of the accident to January 1, 1976, is $19,748.95. (Tr. 522).

Dr. Chisholm then calculated the value of Dupas' impairment of earning capacity (from January 1, 1976), using the same yearly income of $8,929.96, as follows:

1. At the last hourly wage of $3.35 per hour Dupas' gross loss is $290,223.70. Discounted at 5%, his loss is $142,009.70. (Tr. 549, 553).

2. With a 3% wage or productivity increase, Dupas' gross loss is $480,345.21. Discounted at 5%, his loss is $208,498.34. (Tr. 554).

3. With the added inflation factor of 4%, Dupas' gross loss is $1,023,156.77. Discounted at 5%, his loss is $377,942.52. (Tr. 554-5).[2]

The foregoing figures do not include medical and hospital expenses, and assume that Dupas is not able to work at all. (Tr. 555).

Medical Expenses

Undoubtedly Dupas will be examined and treated by physicians and therapists for the rest of his life.

Gary Lucas, who was qualified and accepted by the trial court as an expert in the field of speech therapy, testified that Dupas should have speech therapy indefinitely. Dupas had been going to Mr. Lucas three hours a week, and Mr. Lucas testified that Dupas should continue on that schedule. Mr. Lucas charges $15.00 an [13] hour. (Tr. V-12-13).

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2 Dr. Chisholm stated that the inflation rate was 8.8% in 1973 12.2% in 1974, and 7.2% in 1975, and that the average inflation rate since 1946 is 4-6%. He used the 4% figure in his computations. (Tr. 554-5).

Dr. Patricia Cook testified that Dupas had been prescribed Dilantin while at Charity Hospital as a preventative against epileptic seizures, and that she continued to prescribe it for him. (Tr. 413). Dr. Raeburn C. Llewellyn opined that Dupas should continue to take Dilantin. (Tr. 524).

Mrs. Miriam Dupas characterized watching Dupas as "a 24 hour job." (Tr. V-53). Undoubtedly, he will have to be placed in a nursing home in the near future.

ISSUES

1. Is there a standard, test, or rule used by the courts in Louisiana for determining the amount of awards for lost wages, impairment of earning capacity, and general damages, and if so, is that standard, test, or rule the "ordinary man" test, and what is its definition?

2. Stated another way, should Dupas recover his own specific damages for his own injuries, or should he recover the damages that a fictitious "ordinary man" would have recovered with like injuries?

3. If the answer to the preceding question is that Dupas should receive the damages that a fictitious "ordinary man" would have recovered with like injuries, then should the Court of Appeal determine or calculate a numerical percentage that reflects how much less (or more) than the ordinary man Dupas is in relative worth considering such factors as his relative utility, importance, degree of excellence, usefullness, moral conduct,

significance, etc. and reduce (or increase) the ordinary man's award to Dupas by that numerical percentage?

4. Is inflation a factor to be considered in assessing damages for impairment of earning capacity?

5. Is it proper for the Court of Appeal to consider as a factor in determining an award for impairment of earning capacity and an award for general damages the fact that Dupas had been convicted of a felony even though the record showed that eleven (11) years before the trial of the instant case Dupas received a full pardon of that conviction from the Governor of Louisiana?

[14] 6. Does the record support the Court of Appeal's finding that Dupas "supported himself by theft and burglary" in between his periods of gainful employment?

7. If the answer to the preceding question is in the negative, then was it proper for the Court of Appeal in arriving at an award for impairment of earning capacity and an award for general damages to have considered that Dupas supported himself by theft and burglary in between his periods of gainful employment?

8. Is it proper for the Court of Appeal to find that in some abstract view Dupas' change in lifestyle as a result of his injuries is an improvement insofar as society in general is concerned, and then use this finding as a factor in determining awards for impairment of earning capacity and general damages?

9. Assuming that the record supports the Court of Appeal's following findings of fact, is the fact that Dupas (a) on one occasion pistol-whipped his wife, (b) on one occasion threatened to kill himself, his wife and two children, (c) had been convicted of a felony, (d) had been committed to the Louisiana State Hospital at Mandeville for psychiatric treatment, and (e) on one occasion had been arrested for theft, each a proper factor for the Court of Appeal to consider in determining the amount of an award for general damages?

10. Does the record support the Court of Appeal's finding that Dupas during the rest of his life would produce only one-half of the income per year that he was capable of producing, or $4,464.98 per year?

11. Has Dupas endured physical pain and suffering as a result of his injuries?

12. Has Dupas endured mental pain and suffering as a result of his injuries?

13. Should the Court of Appeal have awarded Dupas an amount for loss of companionship, love, and affection of his wife, and an amount for the loss of companionship, love, and affection of his two children?

[15] 14. Is the Court of Appeal's award of $50,000.00 for general damages inadequate, considering Dupas' massive injuries and his permanent deficits and residuals that the Court of Appeal found as fact?

15. Does the record support and award for (1) future speech therapy in excess of the one year's expenses awarded by the Court of Appeal, and (2) future nursing and housekeeping expenses?

16. Does the amount of the Court of Appeal's award to Dupas and its reasons, rationale, and theories set forth in its opinion rendered on June 30, 1978, taken as a whole, violate the provisions of Article 1, Section 3, of the Louisiana Constitution of 1974?

ASSIGNMENT OF ERRORS

1. The Court of Appeal erred in failing to apply the well-settled rule that there is no standard, rule, or test used by Louisiana courts in assessing damages, and further erred by applying an erroneous rule of law, which it termed "the so-called 'ordinary man' " test, as the standard in assessing damages.

2. The Court of Appeal erred in failing to consider inflation as a factor in assessing damages for impairment of earning capacity.

3. The Court of Appeal erred in its findings of fact and further erred by considering those erroneous facts as factors in determining the amounts of awards for impairment of earning capacity and for general damages.

4. The Court of Appeal erred in awarding Dupas inadequate amounts for (1) general damages and (2)

future speech therapy, and further erred in failing to award Dupas damages for (1) past and future physical and mental pain and suffering, (2) the loss of companionship, love, and affection of his wife and of his two children, and (3) future nursing and housekeeping expenses.

5. The Court of Appeal erred in awarding Dupas inadequate amounts in damages, and in assigning unconstitutional reasons, rationale, and theories, all as set forth in its Opinion rendered on June 30, 1978, as reasons for or justification of the amounts it awarded Dupas for impairment of earning capacity and general [16] damages, all of which when taken as a whole is in violation of the provisions of Article 1, Section 3, of the Louisiana Constitution of 1974.[3]

LAW AND ARGUMENT

I.

THE COURT OF APPEAL ERRED IN FAILING TO APPLY THE WELL-SETTLED RULE THAT THERE IS NO STANDARD, RULE, OR TEST USED BY LOUISIANA COURTS IN ASSESSING DAMAGES, AND FURTHER ERRED BY APPLYING AN ERRONEOUS RULE OF LAW, WHICH IT TERMED "THE SO-CALLED 'ORDINARY MAN'" TEST, AS THE STANDARD IN ASSESSING DAMAGES.

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3 The foregoing also violates the 14th Amendment of the United States Constitution.

The Court of Appeal in its Opinion stated:

> "In Louisiana damages are compensory in nature, and this case presents problems not ordinarily found in damage suits. Dupas' lifestyle prior to the injury was not that of the so-called 'ordinary man' that courts usually use as a standard for a comparison in assessing damages." (Opinion, p. 4).

This statement by the Court of Appeal is an erroneous conclusion of law for there is no statute or case that Dupas could find in his research that even suggests such a rule, and certainly not one that establishes this rule, nor did the Court of Appeal cite any case or statute in support of its pronouncement.

To the contrary the well-settled rule is just the opposite of the rule laid down by the Court of Appeal. This Court has stated over and over that there is no rule or standard of law fixing or establishing the amount of the recovery, and that each case must be evaluated according to its own peculiar facts and circumstances as to the damage caused by the type of injury. *Anderson v. Welding Testing Laboratory, Inc.*, 304 So.2d 351, 352 (La. 1974); *Boutte v. Hargrove*, 290 So.2d 319 (La. 1974), *Miller v. Thomas*, 246 So.2d 16, 18 (La. 1971); *Lomenick v. Schoeffler*, 200 So.2d 127, 129 (La. 1967); *Ballard v. National Indemnity Co. of Omaha, Neb.*, 169 So.2d 64, 67 (La. 1964); *Gaspard v. LeMaire*, 158 So.2d 149, 160 (La. 1963).

Each of the courts of appeal has followed this rule. See, *e.g., Profit v. Linn*, 346 So.2d 253, 256 (1st Cir. 1977); *Brouillet v. State, Through Dept. of Highways*, 275 So.2d 196, 199 (3rd Cir. [17] 1973); *Riley v. Frantz*, 253 So.2d 237, 241 (4th Cir. 1971), *Burton v. Southwestern Gas & Electric Company*, 107 So.2d 62, 66 (2nd Cir. 1958); *McNulty v. Toye Bros. Yellow Cab Co.*, 73 So.2d 23, 30 (Orl. 1954); *Schwandt v. Nunez*, 71 So.2d 583, 587 (Orl. 1954); *Grissom v. Heard*, 47 So.2d 108, 109 (1st Cir. 1950); *Barthelemy v. Phoenix Ins. Co.*, 226 So.2d 603, 607 (3rd Cir. 1969), writ ref.

This Court has said, recently and as far back as 1963, that our courts of appeal have a constitutional duty to render judgment on quantum based on the merits of the case. *Corollo v. Wilson*, 353 So.2d 249, 252 (La. 1977); *Gaspard v. LeMaire*, 158 So.2d 149, 159 (La. 1963).

And in *Gaspard, supra.*, this Court specifically rejected the prevailing tendency at that time of the trial and intermediate courts to award uniform amounts in all cases with similar injuries, observing that such a result is tantamount to setting up a schedule for injuries in a personal injury case as there is in workmen's compensation cases. *Gaspard v. LeMaire*, 158 So.2d 149, 159 (La. 1963).

What the Court of Appeal essentially has said, then, is that an injured person shall not recover his own specific damages for his own specific injuries, but will recover the amount that a fictitious, ordinary man would have recovered for like injuries.

Then the Court of Appeal, effectively, goes even further, by implying that the injured person's lifestyle (which is defined as "an individual's typical way of life")[4] is compared with the fictitious, ordinary man's lifestyle, and if not the same, then the award should not be the same as the award the ordinary man would have received for like injuries.

Conceivable, the award could be less or higher than the ordinary man's award, depending on whether the injured person's lifestyle was comparatively less or comparatively higher than the ordinary man's lifestyle.

In the instant case the Court of Appeal found that Dupas' lifestyle was less than the lifestyle of the ordinary man, and [18] Dupas' argument is in reference to that finding. Dupas suggests, however, that his argument set forth herein applies equally to the instance where a defendant is appealing a higher award than the ordinary man would have received in a case where the trial court or court of appeal found that the injured person's lifestyle was comparatively higher than the ordinary man's lifestyle and for that reason awarded the injured person a higher amount than the ordinary man with like injuries would have received.

Without stating so, and without indicating the basis for doing so, the Court of Appeal then reduced the

4 Webster's New Collegiate Dictionary (G. & C. Merriam & Co., 1976), p. 664.

award it would have given to the ordinary man by a certain factor, and made that award its award to Dupas.

The next question, then, is, How is that factor decided upon or reached? The only conceivable answer to this question is that a trial court or appellate court will reduce the ordinary man's award by a factor computed by determining or calculating a numerical percentage that reflects how much less than the ordinary man the injured person is in relative worth, considering such factors as his relative utility, importance, degree of excellence, usefulness, moral character, significance, etc. and then reducing the ordinary man's award to the injured person by that numerical percentage. (Opinion, p. 4).

But this standard or test advanced and established by the Court of Appeal in this case leaves many unanswered questions, among which are the following:

1. What is an ordinary man, as related to the question of damages?
2. What is the definition of the ordinary man test, as used as a standard for a comparison in assessing damages?
3. What are all of the factors to be considered in arriving at the percentage that reflects how much less than the ordinary man the injured person is?

Will the consequences of this rule result in the trial and appellate courts of this State giving various persons values of worth, according to their occupation, standard of morality, lack of criminal activity, etc.? If so, how will the bench and bar decide [19] upon the traits, characteristics, past history, and all other factors that necessarily should be included in the equation to arrive at a true, fair, and accurate figure for worth?

In its Opinion the Court of Appeal concluded that Dupas' lifestyle prior to the injury was not that of the ordinary man, and then apparently somehow arrived at a "discount" figure, and awarded Dupas less than it would have, had Dupas' lifestyle been similar to what it considered to be the lifestyle of an ordinary man. (Opinion, p. 4).

Aside from constitutional issues, see Point V, *infra.*, pp. 75a-76a, Dupas submits that this test set forth *de novo* by the Court of Appeal in this case, if affirmed by this Court, will create an impossible rule for appellate judges, trial judges, and trial lawyers to follow for no one can possibly think of all of the individual traits, habits, examples of good (or bad) morals or conduct, etc., covering the injured person's entire lifetime that necessarily must be included in evidence on behalf of an injured person to support and award, or evidence on behalf of a defendant to oppose an award.

Compliance with this rule in a suit for personal injuries will result in a victory by the side with the most

examples of good or bad character, traits, or activity. That is, for every "bad" point made against an injured person by a defendant, must the injured person counter with proof of a "good" point? And then, will the victor, as to the amount of an award for damages, be the side that ends up with the most points?

The thought occurs now to Dupas to inquire as to what value can be given to the fact that he helped his daughter with her homework. (Tr. V-26). Will this fact counter one "bad" fact brought out by the defendant, *e.g.*, that he was committed to a mental institution? Or will the ordinary man rule require proof of two, three or more times that Dupas helped his daughter with her homework to counter-balance the fact that he was committed to a mental institution (or that he was arrested once), or will the ordinary man rule require the additional proof, besides, that Dupas took his wife and [20] children to the zoo one time, twice, three times, etc.? (Tr. V-26).

In other words, there is also a question of relative value. How much is taking his wife and children to the zoo worth as compared to Dupas' being arrested once? Does one offset the other?

And, is the proof presented by the defendants that Dupas was committed to a state mental institution offset by the fact that Dupas voluntarily admitted himself? (Tr. V-35). Or would the ordinary man test require the additional fact that Dupas voluntarily

admitted himself to the mental institution because he realized he needed help, (Tr. V-35), to offset defendants' proof?

Additionally, does the test that the Court of Appeal established in this case also apply to suits for property damage? Should a trial court or appellate court consider the character, bad habits, class of friends, etc. of the plaintiff who is suing for the damage to his parked automobile resulting from a collision?

Also, should the rule apply as against a tortfeasor, as well? Should evidence of a defendant's bad character, low morals, criminal activity, etc. be admissible on the question of quantum?

As can be seen from the foregoing, the "ordinary man" rule is not a proper standard or rule to be used in assessing damages, and this Court has declared on innumerable occasions that there is no standard or test to be followed.

Accordingly, the Court of Appeal applied an erroneous rule of law, and abused its much discretion in arriving at an amount for damages.

II.

THE COURT OF APPEAL ERRED IN FAILING TO CONSIDER INFLATION AS A FACTOR IN ASSESSING DAMAGES FOR IMPAIRMENT OF EARNING CAPACITY.

The percentage of inflation should be considered as a factor in assessing damages for impairment of earning capacity. *Brown v. S. A. Bourg & Sons, Inc.*, 118 So.2d 891, 895 (La. 1960); *Faulk v. Power Rig Drilling Co.*, 348 So.2d 219, 222 (3rd Cir. 1977), writ dism.; *Johnson v. International Ins. Co.*, 347 So.2d 1279, 1283-4 (1st Cir. 1977); *Corollo v. Wilson*, 345 So.2d 601, 607 (4th Cir. 1977), award for general damages increased, and aff'd., 353 So.2d [21] 249 (La. 1977); *Loetzerich v. Texas Pacific-Missouri Pac. T.R. of N.O.*, 325 So.2d 626, 628-9 (4th Cir. 1976); *Morgan v. Liberty Mutual Ins. Co.*, 323 So.2d 855, 863 (4th Cir. 1975); *Edwards v. Sims*, 294 So.2d 611, 616 (4th Cir. 1974).[5]

Dupas was age 27 at the time of the accident. (Tr. 547). His life expectancy is 42.9 years, or to age 69.9. (Tr. 548).

Dr. John Chisholm was qualified and accepted by the trial court as an expert in the field of economics and actuarial mathematics. (Tr. 545-7). He was given infor-

5 It is interesting to note that the three-judge, unanimous panel of the Court of Appeal that decided *Corollo v. Wilson, supra.*, awarded Charles Corollo an amount for impairment of earning capacity which included a 4% inflation factor. Two of the three judges on the *Corollo* panel are also on the three-judge, unanimous panel that decided the instant case. In the instant case, however, the panel did not consider inflation as a factor.

Also in *Loetzerich v. Texas Pacific-Missouri Pacific T.R. of N.O., supra.*, the three-judge, unanimous panel affirmed the trial court's consideration of inflation as a factor in determining impairment of earning capacity, but did not specify the percent. Two of the three judges on the *Loetzerich* panel are the same two judges referred to in the *Corollo* case, *supra.*, and the instant case.

mation concerning Dupas' employment and hourly wage history. (Tr. 549).

Utilizing the hourly wage of $3.35 per hour, which was Dupas' last hourly wage in August, 1973, Dr. Chisholm opined that Dupas' yearly income would be $8,929.96. Using this $8,929.96 yearly figure, Dr. Chisholm was of the opinion that the amount of Dupas' lost wages from the date of the accident to January 1, 1976, is $19,748.95. (Tr. 552).[6]

Dr. Chisholm then calculated the value of Dupas' impairment of earning capacity (from January 1, 1976), using the same yearly income of $8,929.96, as follows:

1. At the last hourly wage of $3.35 per hour, Dupas' gross loss is $290,223.70. Discounted at 5%, his loss is $142,009.70. (Tr. 549, 553).

2. With a 3% wage or productivity increase, Dupas gross loss is $480,345.21. Discounted at 5%, his loss is $208,498.34. (Tr. 554).

[22] 3. With the added inflation factor of 4%, Dupas' gross loss is $1,023,156.77. Discounted at 5%, his loss is $377,942.42. (Tr. 554-5).[7]

6 The Court of Appeal awarded Dupas $9,874.48 for lost wages to January 1, 1976, or one-half of the figure used by Dr. Chisholm.

7 Dr. Chisholm stated that the inflation rate was 8.8% in 1973, 12.2% in 1974, and 7.2% in 1975, and that the average inflation rate since 1946 is 4-6%. He used the 4% figure in his computations. (Tr. 554-5).

The Court of Appeal elected to use Dr. Chisholm's figures set forth in sub-paragraph 2, above, rather than the figures in sub-paragraph 3, but divided by two Dupas' yearly income of $8,939.96 which Dr. Chisholm had used, and used $4,464.98 and, therefore, divided Dr. Chisholm's $208,498.34 figure by two also. The Court of Appeal then arrived at the sum of $104,249.17 as the value of Dupas' impairment of earning capacity. (Opinion, p. 4-6).

The Court of Appeal used the 5% discount factor and 3% wage or productivity increase, as did Dr. Chisholm, but failed to consider the 4% inflation factor, as Dr. Chisholm did.

Had the Court of Appeal considered inflation, as it should have, it undoubtedly would have accepted the figures and calculations Dr. Chisholm advanced in sub-paragraph 3, above. Then, if it would have divided Dr. Chisholm's $377,942.52 figure by two, as it had divided Dr. Chisholm's $208,498.34 figure, the Court of Appeal would have awarded Dupas the sum of $188,-971.25.

Subtracting the Court of Appeal's award of $104,-249.17, (Opinion, p. 6), from the $188,971.25, it should be seen that the Court of Appeal erred in failing to award Dupas an additional $84,722.09 for impairment of earning capacity.

Accordingly, the Court of Appeal abused its much discretion in failing to do so.

III.

THE COURT OF APPEAL ERRED IN ITS FINDINGS OF FACT AND FURTHER ERRED BY CONSIDERING THOSE ERRONEOUS FACTS AS FACTORS IN DETERMINING THE AMOUNTS OF AWARDS FOR IMPAIRMENT OF EARNING CAPACITY AND FOR GENERAL DAMAGES.

Facts Considered In Assessing An Award For Impairment of Earning Capacity

In arriving at an award for impairment of earning capacity, the Court of Appeal went back into Dupas' life to ten years before the accident, checking and analyzing every aspect of his life it [23] considered criminal, anti-social, and bad. The Court of Appeal at no time found, nor did it consider, any good quality, good deed, or anything nice about Dupas during the previous ten years of his life.

The Court of Appeal preludes its inquiry with this statement:

> ". . . we find it necessary to rely upon the prior life history of Dupas because we believe it demonstrates a more accurate picture of his actual income loss." (Opinion, p. 5).

With this advance statement, the Court of Appeal then proceeds to isolate and identify portions of Dupas' life (but only the bad or unacceptable aspects) that it will consider in its determination of an award.

The Court of Appeal found that:

1. Dupas supported himself by theft and burglary in between his short periods of gainful employment. (Opinion, p. 5).

2. Dupas was convicted of a felony and imprisoned at the Louisiana State Penitentiary. (Opinion, p. 6).

3. After his release [from the Louisiana State Penitentiary], he continued this lifestyle [*i.e.*, supporting himself by theft and burglary], and was committed to the Louisiana State Hospital at Mandeville for psychiatric treatment for a manic-depressive type of schizophrenia. (Opinion, p. 5).

4. He was arrested for theft. (Opinion, p. 5).

5. He threatened to kill himself, his wife, and children, and pistol-whipped his wife. (Opinion, p. 5).

6. His lifestyle was such that he worked intermittently at best. (Opinion, pp. 5-6).

7. He was only partially successful in rehabilitating himself. (Opinion, p. 6).

8. His life history does not indicate the probability that he could have increased his skills. (Opinion, p. 6).

9. Coupled with his work history Dupas by education and training could only perform

general labor or semi-skilled labor. (Opinion, p. 6).

10. Dupas would produce only one half of the income per year that he was capable of producing. (Opinion, p. 6).

Using these findings of fact as a basis for its judgment, the Court of Appeal then divided by one half the yearly income that Dr. Chisholm, the economist, used in projecting the value of Dupas' impairment of earning capacity. The Court of Appeal then on that basis awarded Dupas one half of the sum that Dr. Chisholm had calculated to be the value of Dupas' impairment of earning capacity. (Opinion, p. 6; Dr. Chisholm, Tr. V-549).

[24] Even if the foregoing facts and conclusions that the Court of Appeal used in assessing damages were true, the Court of Appeal nevertheless should not have considered those facts or the conclusions based on those facts.

Evidence of bad character, previous criminal record, etc. that the Court of Appeal considered should be used only for impeaching a witness' credibility during the trial. Facts such as those considered by the Court of Appeal should not be used in assessing damages.

Generally, evidence of the vicious or immoral habits or character of an injured person can be shown by a defendant only if there is a clear connection or relation

between the habit or character and the injury. 25A C.J.S. Damages, §148, p. 40.

Hence, evidence of the disreputable character of, or immoral life led by, the injured person is usually immaterial so far as the action for bodily injury is concerned. *Ibid.*

Where there is no showing that Dupas' injuries and resulting deficits and disabilities resulted from his antecedent living habits or vices, evidence of Dupas' intemperate habits are not admissible to show mitigation of damages. *Id.*, at p. 41.

The duty of care and of abstaining from injuring another is due to the weak, the sick, and the infirm, equally with the healthy and the strong, and when that duty is violated the measure of damages is the injury inflicted, even though that injury might have been exaggerated or might not have happened at all, but for the peculiar physical condition of the person injured. *Williams v. Reinhart*, 155 So.2d 51, 52 (1st Cir. 1963); *DeLaune v. Lousteau*, 193 So.2d 907, 912-3 (1st Cir. 1967), writ ref.

Even in the instance when a person is afflicted with a terminal disease, and is expected to die in the near future, and a tortfeasor injuries him and the person dies from those injuries, the law holds that the cause of death is those injuries, and there is recovery of damages for wrongful death against the tortfeasor. *Walker*

v. Joseph P. Geddes Funeral Service, 33 So.2d 570, 572-3 (Orl. 1948).

[25] Reputation and moral character is material and relevant only for the purpose of impeaching a witness' credibility during trial, *Ashley v. Nissan Motor Corp. in U.S.A.*, 321 So.2d 868, 871 (1st Cir. 1975), writ ref.; *Fusilier v. Employers Insurance of Wausau*, 235 So.2d 618, 620 (3rd Cir. 1970); *Middleton v. Consolidated Underwriters*, 185 So.2d 307, 309 (1st Cir. 1966), but the inquiry must be limited to general reputation in the opinion of the community and not in the opinion of the impeaching witness, and cannot go into particular acts, vices, or course of conduct. *State v. Frentz*, 354 So.2d 1007, 1009 (La. 1978); *State v. Trosclair*, 350 So.2d 1164, 1168 (La. 1977).

Thus, arrests may not be used to impeach a witness. *State v. Hatch*, 305 So.2d 497 (La. 1974), cert. den. 423 U.S. 842 (1975); *State v. Collins*, 283 So.2d 744 (La. 1973).

Similarly, it is improper to ask a witness to what religion he belongs merely to affect his credibility. *State v. Dyer*, 97 So. 563, 564 (La. 1923).

As there is no connection or relation between Dupas' injuries and his habits or character, the Court of Appeal should not have considered his habits or character in assessing damages.

The Court of Appeal, therefore, erred in considering these findings of fact, *supra.*, even if true, in arriving at its award for impairment of earning capacity.

Further, the foregoing findings of fact listed above (1) are not supported by the record, (2) were improperly considered by the Court of Appeal, or (3) are an exaggeration of the facts contained in the record.

The Finding That Dupas Supported Himself By Theft And Burglary

The record does not support the Court of Appeal's findings that Dupas supported himself by theft and burglary, or that he continued to do so after his release from the Louisiana State Penitentiary.

Dupas has been in trouble with the law only twice in his life.

In one instance, he pleaded guilty to simple burglary and was [26] sentenced to one year in the Louisiana State Penitentiary, which he was to serve at the Louisiana Correctional and Industrial School at DeQuincy, Louisiana. However, he served only four (4) months of that sentence for he was released on parole. (Defendant's Exh. II). At the time of his incarceration, Dupas was 19 years of age. He had not yet married. In 1965 Dupas received a full pardon from the Governor of Louisiana for this burglary conviction. (Exh. P-72). Dupas has no other conviction on his record.

In the other instance Dupas was arrested for theft in 1969. Nothing ever came of this arrest, however, and it remains merely an arrest. Dupas has had no other arrests.

Therefore, the record does not support the Court of Appeal's conclusion, and the Court of Appeal has committed error in so finding that Dupas supported himself by theft and burglary, and abused its discretion in considering that fact in its determination of an award for impairment of earning capacity.

Felony Conviction And Arrest

Clearly, the Court of Appeal should not have considered Dupas' conviction for burglary in light of his full pardon. Nor should the Court of Appeal have considered Dupas' arrest for theft.

During the trial of this case Dupas objected to any testimony relating to his conviction for burglary on grounds he had received a full pardon from the Governor of Louisiana for such conviction, which objection was overruled by the trial court. (Tr. 225-27). The pardon which Dupas received is in the record. (Exh. P-72, Tr. V-54).

A pardon releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. *State v. Lee,* 132 So. 219, 220 (La. 1931).

In any event proof of prior criminal convictions of a witness or party may be inquired into only for impeachment purposes on cross-examination during trial to determine the credibility of that witness or party. *Ashley v. Nissan Motor Corp. in U.S.A.*, [27] 321 So.2d 868, 871 (1st Cir. 1975), writ ref., *Fusilier v. Employers of Wausau*, 235 So.2d 618, 620 (3rd Cir. 1970); *Middleton v. Consolidated Underwriters*, 185 So.2d 307, 309 (1st Cir. 1966).

Such is not the case in the instant matter. On cross-examination defendants did not ask Dupas about his prior conviction. (Tr. 78-9). Asking other witnesses about Dupas' conviction, therefore, certainly is improper. Considering Dupas' conviction as a factor in assessing damages compounds the error.

Accordingly, the Court of Appeal's referring to and considering in its determination of an award the fact that Dupas was convicted of a felony, when legally he wasn't, constitutes an abuse of its much discretion in awarding damages.

Additionally, since the Court of Appeal considered Dupas' prior conviction for improper purposes, the Court of Appeal further abused its much discretion.

The Finding That Dupas Threatened To Kill Himself, His Wife, And Two Children

This finding by the Court of Appeal was a factor the Court of Appeal considered in determining the amount

of awards for impaired earning capacity, (Opinion, p. 5), and for general damages. (Opinion, p. 7).

The Court of Appeal's statement that Dupas threatened to kill himself, his wife, and children is an exaggeration of the facts that are in the record.

For one thing this information is found only in the Southeast Louisiana Hospital at Mandeville (hereafter called "Mandeville") records, as taken down by social workers and medical personnel, who did not testify at the trial. These notations are their impressions of Dupas, and/or are their notations of what Dupas told them when he voluntarily admitted himself at a time when he needed medical help. His statements at a time such as that should not be given much weight in a damage suit four years later. The interview and Dupas' answers were used for diagnosis and treatment only. Further, Dupas objected to the introduction in evidence of these records, which was overruled. (Tr. 283). In no event should these [28] impressions, standing alone, be held to be proof of a fact to the extent that the Court of Appeal should properly rely on these facts, and nothing more, in determining an award for damages.

If the Mandeville records are to be given some weight, then the Court of Appeal also should have considered other remarks and impressions written by the Mandeville personnel, *i.e.*, that Dupas

". . . went into a rage, tried to kill the couple's

two year old daughter by spraying hair spray on the heaters in the house and trying to get them to explode." (Defendants' Exh. III).

Thus, the Mandeville record shows that Dupas merely sprayed hair spray on the heaters in the house and tried to get them to explode. There is no showing in the record that Dupas actually did this, or that hair spray on a heater will cause the heater to explode, nor is there any evidence to show that if the heater had exploded, that it would have caused injury to Dupas' daughter.

What really happened is shown by the questions asked Mrs. Miriam Dupas on cross-examination and her answers, as follows:

"A. Yes, I went with him [when he committed himself to Mandeville]. We had an argument a few days before and it resulted in him hitting me and beating me and he realized that he needed some sort of help.

* * *

"Q. What did he hit you with before that [when he voluntarily committed himself]?

"A. It was a gun.

"Q. And there was also an episode where he

attempted to do away with your daughter, isn't that true?[8]

"A. He was — this happened the same night [that Dupas hit her with a gun *during an argument*]. *I had left* . . . And he decided that he wanted to kill himself *and everyone else.* This is one of the facts that led up to him going to Mandeville. He knew he needed help." (Emphasis added). (Tr. V-35-36).

The foregoing questions and answers make at least eight (8) important points, *viz:*

1. That Dupas and his wife had an argument.
2. That during that argument, he hit his wife once with a gun.
3. That his wife left the premises, undoubtedly taking her daughter with her.

[29] 4. That Dupas then decided he wanted to kill himself and everyone else.

5. That his threat to kill "everyone else" was not directed at anyone in particular.
6. That his wife and child were not present when he threatened to kill everyone else.
7. That this episode made Dupas realize he needed medical help.

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8 At this time Dupas had only one child, rather than the two mentioned by the Court of Appeal.

8. That Dupas voluntarily admitted himself into a mental institution for that help.

Dupas submits that by no stretch of the imagination can the foregoing facts, as set forth in the testimony, be interpreted as meaning that Dupas threatened to kill his wife and children.

The Court of Appeal's considering those facts in its determination of damages constitutes an abuse of its discretion.

The Finding That
Dupas Pistol-Whipped His Wife

The Court of Appeal particularly noted that Dupas "pistol-whipped" his wife. (Opinion, p. 5).

Dupas submits that this statement is a conclusion not supported by the record and is an exaggeration of the facts in the record.

"Pistol-whip" means to beat with a pistol, to assail violently and intemperately. (Webster's New Collegiate Dictionary, [C. & G. Merriam Co., 1978], p. 874).

The only evidence at all of Dupas' hitting his wife with a weapon is found in the Mandeville records and the testimony of Mrs. Miriam Dupas, (Defendants' Exh. III; Tr. V-36). See, *supra.*, pp. 62a-63a, for Mrs. Dupas' testimony.

The Mandeville records further state, however, that "He is afraid of hurting his wife." (Defendants' Exh. III).

In any event the Mandeville records are impressions or notations made by social workers or medical workers employed there. See, further, the discussion on this subject at App. p. 61a, *supra.*

Dupas submits that hitting his wife once with a gun during an argument does not constitute "pistol-whipping his wife," and that the Court of Appeal should not have considered that fact in its assessment of damages. In so doing, the Court of Appeal abused its much discretion in assessing damages.

[30] *Employment, Rehabilitation,*
Skills, And Income

The record does not support the Court of Appeal's finding that Dupas only partially successfully rehabilitated himself, or that Dupas would not have increased his skills. To the contrary, the record shows that Dupas obtained his high school GED diploma, that he entered Delgado College and successfully passed various courses there, and that he worked continuously from July, 1970, to August, 1973.

Using all of the findings of fact set forth in this Point (Point III) as the basis and foundation for its judgment, however, the Court of Appeal then found that Dupas

could only perform general labor or semi-skilled labor, ignoring the fact that Dupas performed satisfactorily as an electrician's helper, that he entered a trade college and successfully passed courses there, and that he likely would have continued either as an electrician or in another skilled trade.

The Court of Appeal then concluded that Dupas could be expected to earn only one-half of what he was capable of earning, and cut the yearly income used by Dr. Chisholm, the expert economist, by one-half, and awarded Dupas one-half of the total sum as calculated by Dr. Chisholm for impairment of earning capacity.[9]

Dupas submits that the Court of Appeal considered erroneous facts in forming the basis for its award for impairment of earning capacity and that in so doing, the Court of Appeal abused its much discretion in arriving at an award.

Facts Considered In Assessing An Award For General Damages

The Court of Appeal, in arriving at an award for general damages, considered all of the factors set forth above under "Impairment of Earning Capacity," *supra.*, App. pp. 53a-66a.

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9 That the Court of Appeal did not include inflation as a factor is briefed under Point II, supra., App. pp. 49a-52a.

In its Opinion, the Court of Appeal stated:

> "We have also mentioned above his criminal and anti-social behavior." (Opinion, p. 7).

[31] Further, the Court of Appeal considered other factors. In its Opinion, the Court of Appeal stated:

> "While it might be said from some abstract point of view, that the change in Dupas' lifestyle is an improvement insofar as society in general is concerned, ..." (Opinion, p. 7).

What the Court of Appeal is saying here, apparently, is that society is better off now because, since being injured by the New Orleans police officer, Dupas' lifestyle has changed, and his new lifestyle is better for society.

The problem in the abstract sense is, who in this city, state, country, and world has the necessary wisdom to decide which of several modes of life, or of several different likes and dislikes that a person must choose between during every minute of his life, is better than the others, or is better for society in general?

What is "good" and "bad" insofar as a person's conduct is concerned is for the State Legislature to determine and then usually as a criminal statute, rather than for a Court of Appeal panel whose duty it is to determine an amount of an award in a personal injury suit.

Clearly, the Court of Appeal's erroneous findings and the Court of Appeal's considering those facts in determining an award for general damages constitute an abuse of its much discretion.

IV.

THE COURT OF APPEAL ERRED IN AWARDING DUPAS INADEQUATE AMOUNTS FOR (1) GENERAL DAMAGES AND (2) FUTURE SPEECH THERAPY, AND FURTHER ERRED IN FAILING TO AWARD DUPAS DAMAGES FOR (1) PAST AND FUTURE PHYSICAL AND MENTAL PAIN AND SUFFERING, (2) THE LOSS OF COMPANIONSHIP, LOVE AND AFFECTION OF HIS WIFE AND OF HIS TWO CHILDREN, AND (3) FUTURE NURSING AND HOUSEKEEPING EXPENSES.

Inadequate Award For General Damages

In its Opinion the Court of Appeal described Dupas' injuries, deficits, and disabilities. (Opinion, pp. 1-4).

Particularly, it should be noted that the Court of Appeal noted:

> "We have already discussed his medical history caused by the severe brain injuries he received, resulting in an organic brain syndrome, aphasis and right hemiparesis,

> demonstrating awkwardness of gait and use of the right side, lack of dexterity, lack of interest in his surroundings and a change in his activity pattern from an [32] active person to a rather withdrawn, disinterested and retiring individual of low normal intelligence." (Opinion, pp. 6-7).

The Court of Appeal further noted:

> ". . . we note that his disabilities are such that he will be handicapped throughout the rest of his life and that he will need the care of someone watching over him in general . . . We do consider that his residual disabilities will handicap him throughout his life span." (Opinion, p. 7).

Thus, the seriousness and permanent nature of Dupas' injuries and his need for further treatment and care is recognized by the Court of Appeal.

The Court of Appeal, however, awarded Dupas the sum of $50,000.00 for general damages in spite of its findings, as aforesaid. Dupas submits that such a low award under the circumstances is grossly inadequate, and as such, constitutes an abuse of the Court of Appeal's much discretion.

Inadequate Award For
Speech Therapy Expenses

The Court of Appeal in its Opinion stated:

> "Additionally we would note that the evidence indicates that he should continue his therapy [*i.e.*, speech therapy] consisting of three sessions a week at $15.00 each, in the amount of $2,340.00." (Opinion, p. 7).

Multiplying $15.00 a session by three sessions a week to equal $45.00 a week, and dividing $45.00 into the $2,340.00 award to equal 52 weeks, it is seen that the Court of Appeal awarded Dupas expenses for only one year of future speech therapy.

Undoubtedly, in awarding future speech therapy expenses at all, the Court of Appeal accepted the testimony of Gary Lucas, the speech therapist. But Mr. Lucas testified that Dupas should continue with three sessions a week indefinitely. (Tr. V-12-13).

Also, the Court of Appeal found that it is in the area of Dupas' speech impairment that he has any chance of improvement, although slight. (Opinion, p. 4).

Dupas submits that the Court of Appeal should have awarded him an amount for future speech therapy expenses in excess of one year and that it abused its much discretion in failing to do so.

[33] The $50,000.00 award for general damages did not include damages for (1) past and future physical and mental pain and suffering, and (2) the loss of companionship, love, and affection of his wife and two children, which the Court of Appeal should have awarded, and (3) no award for future nursing and housekeeping expenses.

No Award For Past And
Future Physical and Mental Pain

The Court of Appeal in its Opinion stated that Dupas suffered very little pain in the initial stages of his treatment, and he suffers none thereafter. It would seem, therefore, that the Court of Appeal did not include in its $50,000.00 award any amount for past and future physical and mental pain.

The Court of Appeal thereby ignored or failed to see the evidence of such pain that is in the record:

A. Physical Pain and Suffering

The record shows that Dupas suffers pains in his feet and legs. (Tr. V-63). He also suffers seizures, and sometimes passes out on to the floor. (Tr. V-62). Dr. Johnson testified that minor and major seizures and loss of consciousness are not unusual following severe brain injuries such as Dupas had. (Tr. 278).

B. Mental Pain and Suffering

Dupas knows there is something wrong with him. He knows he lost part of his brain. (Tr. 270). He stated he loves his wife and children but that he cannot go back to living with them because, "Just can't do it. My head like it is, I can't do it." (pointing to his left temple). (Tr. V-78).

When Dr. Johnson asked how he felt, Dupas replied, "I feel down." (Tr. 273-4).

Dupas is aware that he cannot use his right arm very well. He is afraid to go outside because he might not be able to protect himself with his right arm. (Tr. 270, 277).

He complains that he feels that he is slow, and that he has trouble knowing how to say things. He does not feel like doing much of anything, does not want to see people, friends, his wife, or his children. (Tr. 269-70).

[34] Dupas separated from his wife and children. (Tr. V-21). Dupas' separation from his wife and children is consistent with what a person having injuries similar to those he sustained would do. (Dr. Johnson, Tr. 277).

Dupas becomes irritated when people do not seem to understand what he is saying. (Tr. 275).

Clearly, Dupas has suffered physical and mental pain and will continue to do so for the rest of his life.

The Court of Appeal should have awarded Dupas amounts for such pain and suffering, and its failure to do so constitutes an abuse of its much discretion.

No Award For Loss Of Companionship, Love, And Affection Of His Wife And Children

The Court of Appeal did not award Dupas any amount for loss of cohabitation and companionship of his wife because "the evidence shows that his previous lifestyle was such that he enjoyed no settled family life," (Opinion, p. 7), and made no mention of an award for the loss of the companionship, love, and affection of his children.

The only basis for the Court of Appeal's position, apparently, is its finding that Dupas threatened to kill his wife and children and that he pistol-whipped his wife. (Opinion, p. 5,7). These findings are fully discussed at App. pp. 60a-65a.

This one episode, however, should not negate or cancel out all of the other hours and days of Dupas' life nor should it negate or cancel out the relationship between Dupas and his wife and children that existed before and after this one incident.

One isolated incident during ten years of a person's life should not act to mitigate damages to the benefit of a tortfeasor.

The record clearly shows that Dupas engaged in and enjoyed many activities with his wife and children. He took his wife and children to the drive-in. They went to the zoo and to see the Ice Capades. Dupas took his family to the circus and to church. (Tr. V-26). Dupas took his wife and children camping, hunting, and fishing. (Tr. V-61, V-73). He helped his daughter with her homework. (Tr. V-26).

[35] Before this accident, he was living with his wife and children, was attending college and was working, and was enjoying life. Had this accident not occurred, Dupas more likely than not would have continued to work or attend college, and would have continued the relationship of husband and father.

Dupas submits that the Court of Appeal's finding that he enjoyed no settled family life is not supported by the record and, therefore, the Court of Appeal's failure to award Dupas damages for the loss of companionship, love, and affection of his wife and children constitutes an abuse of its much discretion.

No Award For Future
Nursing And Housekeeping Expenses

The Court of Appeal found that ". . . his disabilities are such that he will be handicapped throughout the rest of his life and that he will need the care of someone watching over him in general." (Opinion, p. 7).

Though recognizing that Dupas will require outside care all during the rest of his life, the Court of Appeal made no award for such future expenses.

Dupas now lives with his mother and father, but his father is 64 years of age, and his mother is 58 years of age. (See, Certificate of Birth, Exh. P-47, which notes the ages of the parents in 1946 as 32 and 26).

Obviously, Dupas' parents will not be able to look after him much longer. Therefore, it will become necessary to hire qualified persons to watch over him and see to his daily, personal needs.[10]

Accordingly, the Court of Appeal should have awarded an amount for future nursing and housekeeping expenses, and its failure to do so constitutes an abuse of its much discretion.

V.

THE COURT OF APPEAL ERRED IN AWARDING DUPAS INADEQUATE AMOUNTS IN DAMAGES, AND IN ASSIGNING UNCONSTITUTIONAL REASONS, RATIONALE, AND THEORIES, ALL AS SET FORTH IN ITS OPINION RENDERED ON JUNE 30, 1978, AS REASONS FOR OR JUSTIFICATION OF THE AMOUNTS IT AWARDED DUPAS FOR IMPAIRMENT OF EARNING CAPACITY AND

10 Mrs. Miriam Dupas characterized watching Dupas as "a twenty-four hour job." (Tr. V-53).

GENERAL DAMAGES, ALL OF WHICH [36] WHEN TAKEN AS A WHOLE IS IN VIOLATION OF THE PROVISIONS OF ARTICLE 1, SECTION 3, OF THE LOUISIANA CONSTITUTION OF 1974.[11]

Article 1, Section 3, of the Louisiana Constitution of 1974 (hereafter called "Louisiana Constitution") states:

> "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

The guiding principle of equal protection of the law is that all persons similarly situated shall be treated alike. *Babineaux v. Judiciary Commission*, 341 So.2d 396, 401 (La. 1977); *City of Shreveport v. Dickason*, 107 So. 427, 431 (La. 1926).

The Louisiana Constitution and the Louisiana jurisprudence, therefore, requires the equal protection for all persons, and prohibits discrimination by the law because of beliefs, affiliations, culture, or physical condition.

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11 The foregoing also violates the 14th Amendment of the United States Constitution, Section 1.

"Culture" is defined as follows:

> "(1) cultivation, tillage; (2) the act of developing the intellectual and moral facilities, esp. by education; (3) expert care and training; (4) (a) enlightenment and excellence of taste acquired by intellectual and aesthetic training, (b) acquaintance with and taste in fine arts, humanities, and broad aspects of science as distinguished from vocational and technical skills; (5) (a) the integrated pattern of human behavior that includes thought, speech, actions, and artifacts, and depends upon man's capacity for learning and transmitting knowledge to succeeding generations, (b) the customary beliefs, social forms, and material traits of a racial, religious, or social group." (Webster's New Collegiate Dictionary [G. & C. Merriam Co., 1976], p. 277).

"Discriminate" is defined as follows:

> "vt 1. a. to mark or perceive the distinguishing or peculiar features of.
> b. distinguish, differentiate.
> 2. to distinguish by discerning or exposing differences, esp. to distinguish (one life object) from another.
> vi 1. a. to make a distinction.

2. to make a difference in treatment or favor on a basis other than individual merit."

(Webster's New Collegiate Dictionary [G. & C. Merriam Co., 1976], p. 326).

[37] From a reading of the foregoing definitions it seems clear that the Court of Appeal should not have considered the fact that Dupas "beat" his wife, or threatened to kill himself, his wife, and his child, even if these are true facts. Nor should the Court of Appeal have considered the fact that Dupas had been convicted of a felony, and that he had been arrested for theft.

Nor should the Court of Appeal have considered the fact, even if true, that Dupas used drugs.

His anti-social behavior, even if true, which the Court of Appeal pointed out specifically, (Opinion, p. 7), should not have been considered. Nor should the Court of Appeal have considered the fact that Dupas had been committed to a mental institution, even though voluntarily and for a short period.

All of the foregoing are manifestations of Dupas' beliefs, culture, affiliations, and physical condition. The Louisiana Constitution mandates that the outcome of a lawsuit must not be affected by a party's beliefs, culture, affiliations, and physical condition.

The Court of Appeal, however, did just that. It found that Dupas' lifestyle was not that of the ordinary man.

(Opinion, p. 4). It then effectively proceeded to penalize Dupas for not being the same as the ordinary man by reducing the amount of damages.

The Court of Appeal next inquired into Dupas' life history, covering the past eleven and one-half years prior to the accident. (Opinion, p. 5).

The Court of Appeal found that Dupas had been discharged in 1963 for being absent from work.[12] He was penalized for this. *(Ibid.)*

The Court of Appeal found that Dupas worked for numerous employers for a short period of time. It penalized him for that. *(Ibid.)*

The Court of Appeal next found as a fact that Dupas supported himself by theft and burglary, and Dupas accordingly was penalized again. *(Ibid.)*

[38] The Court of Appeal then mentioned Dupas' felony conviction and arrest for theft, and then pointed out that Dupas had been committed to the Louisiana State Hospital at Mandeville. His award was correspondingly reduced. *(Ibid.)*

Then the Court of Appeal observed that Dupas pistol-whipped his wife, and that he threatened to kill himself, his wife, and his children. *(Ibid.)*

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12 Actually, the record shows that Dupas had quit his job for reasons of his own, which are not specified in the record. (Tr. V-73-4). He could have left for any number of reasons.

The Court of Appeal stated that Dupas suffered from serum hepatitis which he "apparently" contracted from an unsterile syringe used for a heroin injection. (Opinion, p. 6).

The Court of Appeal closed by stating in no uncertain terms that society is better off, now that Dupas is so severely injured (Opinion, p. 7), and then awarded Dupas $50,000.00 in general damages. This award is in spite of its findings of permanent mental and physical disabilities, and its finding that Dupas would be handicapped throughout his life span.

Dupas cited case awards in his Original Brief, pp. 19-21, wherein injured persons received $65,000.00 - $100,000.00 in general damages for injuries that were much less severe than Dupas' injuries or were not permanent, as Dupas' are. (See, Original Brief, pp. 93-95).

Although prior awards are not binding, they will show just how much the Court of Appeal penalized Dupas for his beliefs, culture, affiliations, and physical condition.

For example, plaintiff was awarded $65,000.00 in general damages in *York v. Sedotal*, 281 So.2d 170 (4th Cir. 1973). Plaintiff's injuries were a right shoulder fracture and dislocation, weakness in right hand and arm, and mental depression.

In *Edwards v. Sims*, 294 So.2d 611 (4th Cir. 1974), plaintiff suffered a herniated disc, took a less paying job, curtailed his activities, and underwent a lumbar laminectomy. Plaintiff was awarded $60,000.00 in general damages.

In *Wallace v. Pan American Fire Cas. Co.*, 352 So.2d 1048 (3rd Cir. 1977), plaintiff suffered burns over most of his body and was [39] hospitalized three months. Plaintiff was awarded $100,000.00 in general damages.

Other cases cited by Dupas in his Original Brief, pp. 23-4, show injured persons with injuries and residuals of a less serious nature than, or in some ways similar to Dupas' injuries and residuals, receiving $350,000.00 to $400,000.00 in general damages. (See, Original Brief, pp. 97-98).

For example, in *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La. 1977), the plaintiff lost all four of his fingers of his right hand and part of his right palm. Plaintiff was awarded $350,000.00 in general damages.

And in *Faulk v. Power Rig Drilling Co.*, 348 So.2d 219 (3rd Cir. 1977), plaintiff suffered the amputation of part of the right frontal lobe of his brain which affected his personality, judgment, behavior, and ability to get along with people. His injury, however, did not affect his reading, writing, or motor skills, as did Dupas' injuries. Plaintiff was awarded $375,000.00 in general damages.

In *Corollo v. Wilson*, 353 So.2d 249 (La. 1977), a seven year old boy suffered a brain stem injury, had been in a coma, had permanent reduction of intellectual power, had an alteration of his personality, and was 100% disabled in his left arm and 70% in his left leg. He was awarded $600,000.00 in damages, of which about $400,000.00 was for general damages.

Throughout its Opinion, the Court of Appeal referred to Dupas' lifestyle, conviction, arrest, incarceration in the Louisiana State Penitentiary, commitment to a state mental institution, pistol-whipping his wife, threatening his children, and use of drugs.

Thus, this Court need not speculate on the rationale or thinking behind the Court of Appeal's low awards for impairment of earning capacity and for general damages for the Court of Appeal specified and set forth its exact thoughts, feelings, and reasoning on why it awarded the amounts it did.

[40] In examining these feelings and thoughts and the Court of Appeal's reasoning, it should be seen that the provisions of Article 1, Section 3, of the Louisiana Constitution[13] were violated by the Court of Appeal, because clearly, the only reason the Court of Appeal awarded Dupas $104,245.17 for impairment of earning capacity and $50,000.00 for general damages, and not higher awards, is because it disapproved of Dupas'

13 and of Section 1 of the Fourteenth Amendment to the U. S. Constitution, and perhaps also Article 1, Section 22, of the Louisiana Constitution.

beliefs, culture, affiliations, and physical condition. Disregarding these factors, the Court of Appeal undoubtedly would have awarded him much more than that.

Therefore, the Court of Appeal in determining the amounts of awards based its assessment of damages on erroneous, immaterial, and irrelevant facts of such a nature, that in so doing it violated the clear provisions of Article 1, Section 3, of the Louisiana Constitution.[14]

Accordingly, Dupas submits that the Court of Appeal's Opinion and judgment were based on and were the result of unconstitutional action or process on the part of the Court of Appeal, and therefore, the Court of Appeal abused its much discretion in awarding damages.

VI.
CONCLUSION

The only question to be decided by this Court is whether or not the Court of Appeal abused its much discretion in making its award. *Corollo v. Wilson*, 353 So.2d 249, 252 (La. 1977); *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La. 1973); *Miller v. Thomas*, 246 So.2d 16, 19 (La. 1971); *Riley v. Frantz*, 253 So.2d 237, 241 (4th Cir. 1971).

Dupas submits that this Court, either on constitutional grounds or on non-constitutional grounds,

14 Ibid.

should find that the Court of Appeal abused its much discretion.

Initially, Dupas suggests that the Court of Appeal abused its discretion (1) by making inadequate awards for general damages and impairment of earning capacity, and (2) by basing its awards on an erroneous rule of law, on findings of fact that were [41] erroneous, and after considering the facts that it should not have considered or that were immaterial and irrelevant.

Further the "ordinary man rule" which the Court of Appeal established in this case is in direct contravention of the decisions of this Court. All of the circuits, including the Fourth Circuit, follow the rule laid down by this Court, which is directly opposite to the "ordinary man rule."

To say that the ordinary man rule is an impossible rule to follow and that it will cause chaos all over Louisiana in the area of personal injury litigation is an understatement. Undoubtedly both sides in lawsuits will oppose this rule.

Secondly, the Court of Appeal abused its discretion by making inadequate awards for general damages, impairment of earning capacity, and future speech therapy.

Dupas submits that the Court of Appeal abused its much discretion in awarding him only $50,000.00 for general damages.

He makes this statement in light of prior awards, and particularly, in view of *Corollo v. Wilson*, 345 So.2d 601 (4th Cir. 1977), where the plaintiff was awarded $200,000.00 in general damages for injuries that were not as serious as, or at least were not more severe than, Dupas' injuries. This Court increased the award for general damages from $200,000.00 to $400,000.00. *Corollo v. Wilson*, 353 So.2d 249 (La. 1977).

Dupas cited other cases to the Court of Appeal in his Original Brief where plaintiffs with less serious injuries and injuries that were not of a permanent nature received amounts for general damages which were considerably higher than the $50,000.00 that Dupas was awarded.

Although these prior awards are not binding, they are cited here for comparison purposes to show that the Court of Appeal's award is so inadequate as to be an abuse of its discretion. *Ballard v. National Indemnity Co. of Omaha, Neb.*, 169 So.2d 64, 67 (La. 1964).

Further, in evaluating these older awards in terms of today's [42] dollar, the depreciating purchasing power of money over the past decade should be considered. *Brown v. City of Alexandria*, 226 So.2d 600, 602 (3rd Cir. 1969), writ ref.; *Wainright v. Globe Indemnity Co.*, 75 So.2d 554, 556 (2nd Cir. 1954); *Kelly v. Neff*, 14 So.2d 657, 661 (2nd Cir. 1943). See, *Morgan v. Liberty Mutual Ins. Co.*, 323 So.2d 855, 863 (4th Cir. 1975), writ dism.

Regarding impairment of earning capacity, the Court of Appeal failed to consider inflation in its award for damages for impairment of earning capacity. This failure resulted in the Court of Appeal's awarding Dupas $84,722.09 less than it should have awarded.

The Court of Appeal recognized Dupas' need for speech therapy but awarded Dupas expenses for only one year of future speech therapy. The record clearly indicates that the award should have been for a period in excess of one year.

Thirdly, the Court of Appeal abused its discretion by not making any award at all for past and future physical pain and suffering; loss of companionship, love, and affection of his wife and children; and future nursing and housekeeping expenses.

Dupas submits that he proved these items by a preponderance of the evidence and that the Court of Appeal should have awarded damages in these areas.

Finally, the Court of Appeal abused its discretion by awarding Dupas inadequate amounts in damages, and in assigning unconstitutional reasons, rationale, and theories as reasons for or justification of the amounts it awarded Dupas for impairment of earning capacity and general damages.

Dupas submits that the action of the Court of Appeal in rendering its Opinion and awards, in view of its reasons, rationale, and theories in support thereof,

when taken as a whole, discriminated against Dupas and denied him the equal protection of the law, in violation of the provisions of Article 1, Section 3, of the Louisiana Constitution.[15]

Accordingly, the Court of Appeal's Opinion and judgment [43] awarding Dupas damages were based on and were the result of unconstitutional action and process, which constitutes an abuse of the Court of Appeal's much discretion in awarding damages.

Petitioner prays that his petition be granted. The Court of Appeaal found that his injuries and residuals are devastating and permanent, and that his life has been drastically and totally changed.

His need for further speech therapy and future nursing and housekeeping expenses is evident from a reading of the Court of Appeal's Opinion.

Once again petitioner is requesting that this Court intervene and allow him to continue on his journey down the judicial road that ends at the destination that petitioner is seeking — justice.

Justice requires that this Court, the Supreme Court of Louisiana — the court of last resort in the State of

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15 A corollary issue that this Court should also decide is whether the Court of Appeal's Opinion and awards violated the provisions of Section 1 of the Fourteenth Amendment to the U. S. Constitution, and perhaps also, Article 1, Section 22, of the Louisiana Constitution.

Louisiana, should decide whether petitioner will arrive at that final destination.

Petitioner urges this Court not to let his journey stop at this last intermediate stopping station — the Court of Appeal's decision.

ANNEXED DOCUMENTS

Petition For Damages

First Amended Petition

Answer of Defendants

Judgment of Trial Court On The Merits

Comments Of Trial Judge At Close Of Trial

Judgment Of Trial Court Permitting Appeal In Forma Pauperis

Opinion On Remand Of The Court Of Appeal

Application For Rehearing

Copy Of Card Showing Rehearing Denied On September 12, 1978

Original Brief On Remand Filed By Robert M. Dupas, Jr.

First Supplemental Brief On Remand Filed By Robert M. Dupas, Jr.

Original Brief In Support Of Application For Rehearing On Remand Filed by Robert M. Dupas, Jr.

[44] Original Brief On Remand Filed By The City Of New Orleans, et al.

WHEREFORE, petitioner prays that writs of certiorari or review, or a remedial writ, be issued to the Honorable Judges of the Court of Appeal for the Fourth Circuit directing that a certified copy of the proceedings entitled "Robert M. Dupas, Jr. vs. City of New Orleans, Travelers Insurance Company, and William O. Brown," Docket No. 8060, be sent to this Court, that the judgment on remand of the Court of Appeal be reviewed, and after due consideration, that the judgment on remand of the Court of Appeal be reversed and that this Court award general and special damages in such increased amounts as this court considers fair and just.

Gerald P. Aurillo
Attorney for Plaintiff-
Appellant, Robert M.
Dupas, Jr.
3332 N. Woodlawn Avenue
Metairie, Louisiana 70002
455-2132

New Orleans
October 10, 1978

VERIFICATION

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally appeared Gerald P. Aurillo, who deposed and said that he is the attorney for petitioner; that all allegations in the foregoing petition are true and correct; and that copies of this petition have been served on defendants-appellees by leaving copies of same at the offices of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Attorneys at Law, Attention: James L. Selman, II, Esq., and at the office of the City Attorney for the City of New Orleans, Attn: Gerald A. Stewart, Esq., or to the attention of the assistant city attorney replacing Mr. Stewart, on October 10, 1978.

/s/GERALD P. AURILLO
Gerald P. Aurillo

Sworn to and subscribed before me this 10th day of October, 1978.

/s/KERRY P. CAMARATA
Notary Public

APPENDIX D

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112
October 26, 1978

ROBERT M. DUPAS, JR.

versus No. 63,207

CITY OF NEW ORLEANS,
TRAVELERS INSURANCE COMPANY,
WILLIAM O. BROWN

In re: Robert M. Dupas, Jr. applying for Writ of Certiorari, Court of Appeal, Fourth Circuit, Parish of Orleans.

Writ denied.

ATJR
JWS
FWS
JAD
PFC
WFM
JLD

SEAL

APPENDIX E

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPENDIX F

LOUISIANA STATE CONSTITUTION OF 1974
ARTICLE 1, Section 3
Vol. 1, p. 240

RIGHT TO INDIVIDUAL DIGNITY

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably

discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

APPENDIX G

LOUISIANA STATE CONSTITUTION OF 1974
ARTICLE 1, Section 22
Vol. 1, p. 546

ACCESS TO COURTS

All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1157

ROBERT M. DUPAS, JR.,
Petitioner,

versus

CITY OF NEW ORLEANS,
TRAVELERS INSURANCE COMPANY, and
WILLIAM O. BROWN,
Respondents.

ORIGINAL BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 9, 1979

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TABLE OF AUTHORITIES

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ORIGINAL BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioner, Robert M. Dupas, Jr., files this original brief in response to the reply brief filed by respondents, City of New Orleans, Travelers Insurance Company, and William O. Brown.

I.

PETITIONER ADEQUATELY RAISED THE FEDERAL CONSTITUTIONAL QUESTION TO THE SUPREME COURT OF LOUISIANA.

In his Petition For Writ Of Certiorari to the Supreme Court of Louisiana, petitioner set forth in detail his argument supporting his contention that the action of the Louisiana Court of Appeal violated provisions of the Louisiana Constitution of 1974.

Petitioner contended in the same petition that the same facts and action of the Court of Appeal, as set forth therein, also violated the Fourteenth Amendment to the Constitution of the United States. Petitioner believed that to have repeated all of the previously set forth facts and arguments to support his federal constitutional question would have unduly burdened the Supreme Court of Louisiana with a rather lengthy petition. Therefore, footnotes which incorporated the full content of the text were used to raise the federal constitutional question.

Petitioner submits that those footnotes, together with the full text of the petition, adequately raised the issue in the Supreme Court of Louisiana.

In the case of *Harding v. Illinois*, 196 U.S. 78 (1904), cited by respondents, the petitioner therein merely stated that the state court erred for the reasons stated in his motion for new trial. The motion for new trial

contained only a general statement that the judgment was contrary to the United States Constitution and constituted taking property without the due process of law. (at p. 85). There was no brief or argument submitted to the state court on such points.

Petitioner submits that the situation in the *Harding* case is not similar to the instant case.

Petitioner urges that this Court find that he adequately and properly raised the federal constitutional question in the state court.

II.

THE JUDGMENT OF THE LOUISIANA COURT OF APPEAL IS NOT SUPPORTED BY INDEPENDENT AND ADEQUATE GROUNDS UNDER LOUISIANA LAW.

Respondents merely conclude that:

> "However, in view of the fact there must be some support in Louisiana law for the Louisiana Supreme Court's refusal of the petitioner's writ in this case, the Supreme Court should apply this doctrine and deny the petitioner's writ for certiorari." (Brief, p. 6).

The Supreme Court of Louisiana refused a writ without comment. (See, Appendix D, p. 91a).

Respondents do not cite the Louisiana law they claim supports the Louisiana Court of Appeal's judgment.

Petitioner submits, therefore, that there is none, and respondents' contention should be rejected.

III.

THE LOUISIANA COURT OF APPEAL USED AN IMPROPER TEST IN DETERMINING PETITIONER'S GENERAL DAMAGES.

The Court Of Appeal's Test

Petitioner's claim of unconstitutional action on the part of the Louisiana courts is limited to the unusually low award of $50,000.00 for general damages. (Petition, p. 7). The Louisiana court's awards for special damages, such as lost wages, impairment of earning capacity, and past and future medical expenses, are not at issue herein.

Respondents claim that petitioner misconstrued the Louisiana Court of Appeal's reference to the "ordinary man." (Brief, p. 6). Petitioner did not misconstrue the Louisiana Court of Appeal's language for it stated in no uncertain terms that:

> ". . . this case presents problems not ordinarily found in damage suits. Dupas' lifestyle prior to the injury was not that of the so-called 'ordinary man' that courts usually use as a standard for a comparison in assessing damages." (Petition For Writ Of Certiorari, Appendix A, p. 6a).

In other words, according to the Court of Appeal, the instant case was one of the few cases that involved a plaintiff whose lifestyle did not conform to that of an "ordinary man."

Clearly, the Court of Appeal compared petitioner's general damages to that of an ordinary man's general damages. Petitioner has shown that the ordinary man test is not the test used in Louisiana.

Petitioner can see no compelling reason why the Court of Appeal should, as it indicated it would (and did), award one plaintiff with petitioner's massive injuries and residuals one amount for general damages (*i.e.*, past and future pain and suffering) and another plaintiff a different amount, depending on whether such plaintiff was a man of wealth, poverty stricken, or of average means, and whether such plaintiff was a person with a criminal record or one with no criminal record at all.

A plaintiff's general damages are the same, whether he is a scientist with no criminal record or whether he is a person who has been convicted of a crime and who has struck his wife with a gun on one occasion.

Prior to this accident on October 15, 1973, petitioner was a 27 year old male, in good health and enjoying the

normal pleasures of married life and the companionship of two children, ages 6 and 2. He went to church on Sundays, and took his wife and children places. (Tr. V-27).

He liked fishing, crabbing, hunting, going to the drive-in, going to the zoo and circus, drafting, and reading. (Tr. 219-21, V-26-7, V-59, V-60-1, V-64). He did things with his wife and children. (Tr. 221-2, V-61). Petitioner helped his daughter with her homework. (Tr. V-26). He talked a lot before the accident. (Tr. 220, V-60-1). He displayed an interest in girls and women, and had a lot of friends. (Tr. V-59-61). Petitioner read extensively, and could talk about any subject, especially about animals and the earth. (Tr. V-64).

He had every reasonable expectation of living out his life in a normal way, earning a living at a regularly increasing rate, raising his standard of living as he grew older and earned more, and seeing his children grow and do well in life, all without the physical and mental pain and suffering he has endured and will continue to endure for the rest of his life. But then petitioner suffered this accident at the hands of a New Orleans police officer. Petitioner's injuries and residuals resulting from this accident are set forth in his Petition For Writ Of Certiorari, Appendix C, p. 32a-36a.

Now, petitioner lives with his parents, (Tr. V-21, V-61), his children are afraid of him, (Tr. V-28), and all he does is sit around the house listening to stereo, and

plays with the cat in the backyard. He doesn't go anywhere, and he has no friends. (Tr. 420, V-28, V-59-61).

Petitioner submits that an award based on his injuries and residuals should be made without regard to his lifestyle. Petitioner's general damages are the same, whether or not he had been convicted of a criminal offense, and whether or not his behavior is classified as anti-social.

Respondent's position that a bum with petitioner's injuries and residuals should be awarded less in general damages than a nuclear scientist with petitioner's injuries and residuals should shock one's conscience.

Errors Set Forth In Respondents' Reply Brief

Petitioner realizes that the transcript of the testimony is not before the Court, and therefore, hesitates to enter into a factual debate with respondents. However, petitioner feels compelled to mention certain errors or misstatements of fact that respondents set forth in their Brief.

1. Respondents state that ". . . the medical evidence shows to an equally definitive degree that plaintiff made a remarkable recovery from his injury, that he is physically and mentally functional, and continued to exhibit improvement right up to the time of trial." (Respondents' Brief, p. 7).

This statement is erroneous and is based on Dr. Kline's testimony that plaintiff "had made a rather remarkable recovery, albeit incomplete, but nonetheless he recovered a good deal of function after a nearly fatal head injury." (Tr. 26).

Dr. Kline's testimony must be taken in context. Certainly, to the treating physician the fact that petitioner was alive and able to walk and speak constituted a "remarkable recovery." This statement, in conjunction with all of Dr. Kline's testimony did not mean that Dr. Kline believed petitioner had "recovered."

2. Respondents refer to Dr. Kline's opinion regarding petitioner's ability to work. (p. 7).

The transcript, at pp. 25-27 and p. 46, says nothing about petitioner's ability *vel non* to work or any other point stated in respondent's text.

However, Dr. Kline did testify that it would be difficult for petitioner to "nail down and keep a job." (Tr. 34).

Dr. Cook, contrary to respondents' understanding of her testimony, stated that petitioner could work "in a sheltered workshop with some supervision." (Tr. 421). She defined "sheltered workshop" as "something for the neurologically handicapped, retarded where adult retardants are." (Tr. 421). Clearly, Dr. Cook's opinion is opposite to what respondents understand her opinion to be.

3. Respondents claim that petitioner suffered no pain. (Brief, p. 7-8).

The record shows that petitioner has suffered physical and mental pain. (Petition For Writ, Appendix C, p. 31a-32a).

4. Respondents' position from the very beginning of this case to its present brief before this Court has been that petitioner "suffered a serious head injury from which he has significant residuals," (Brief, p. 7), but that petitioner's lifestyle was not that of an average law-abiding, productive, socially integrated and responsible citizen." (Brief, pp. 11-12).

Respondents' opinion of petitioner, consistently throughout the course of this case, has been and still is that petitioner was a consistently erratic, irresponsible, criminally prone, violent, drug dependent, disillusioned, depressed, paranoic, ambitionless and nonproductive man-child." (Brief, p. 16).

Respondents consistently closed its arguments in all of the courts below, as they do herein, with a statement that petitioner and society are better off now, because of petitioner's injuries. (Brief, p. 17).

Shockingly enough, three judges out of three on the Louisiana Court of Appeal panel agreed with respondents' view of the damages aspect of the case,

stated so in no uncertain terms, and made an award accordingly. (Petition For Writ, Appendix A, pp. 1a-11a).[1]

Petitioner submits that respondents, in citing all of the horrible, bad, criminal and anti-social aspects of petitioner's life through ten pages of printed brief filed in this Court, (Brief, pp. 7-17), supports and corroborates the contentions and arguments petitioner set forth in his Petition For Writ Of Certiorari filed herein.

Petitioner suggests that respondents' Brief, as aforesaid, is ample proof that the low award made to petitioner was only because of his lifestyle and for no other reason.

5. Respondents refer to petitioner's grades on the California Achievement Test, (Brief, p. 9), which petitioner made prior to this accident.

Petitioner submits that petitioner's high grades (12th grade and first year college) are significant, even though respondents attempt merely to pass over them.

Further, petitioner's grades on the GED tests (again, made before this accident) were rather high. Respondents' assessment of the percentiles are erroneous. Petitioner's scores were as follows:

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1 Particularly shocking is the Court of Appeal's finding that "[W]hile it might be said from some abstract point of view, that Dupas' lifestyle is an improvement insofar as society in general is concerned, nevertheless we note that. . . ." (Petition For Writ, Appendix A, p. 10a).

a. On the first test, he scored higher than 39% of the persons taking the test.

b. On the second test, he scored higher than 69% of the persons taking the test.

c. On the third test, he scored higher than 61% of the persons taking the test.

d. On the fourth test, he scored higher than 26% of the persons taking the test.

e. On the fifth test, he scored higher than 41% of the persons taking the test. (Tr. 129).

Clearly, then, petitioner achieved scores on two of the five tests in the upper 30-39% of the total, and in the third test, in the upper 41% of the total.

Thus, considering both his GED scores and his California Achievement Test scores, it can be seen that before this accident petitioner was not the complete mentally deficient person that respondents paint him to be.

6. Respondents' claim that petitioner's head injury resulted in little or no reduction intellectually or in the area of mental achievement is not true. (Brief, p. 11).

Prior to this accident petitioner did well on the California Achievement Test and on the GED test, through which he obtained his high school equivalency diploma. (See, paragraph 5, above.) A GED diploma

allows a graduate to enter any state owned-operated university, college, trade school, or vocational school. (Tr. 123).

Petitioner submits that his intellectual capacity before this accident is a far cry from his "retardant level" found by Dr. Cook. (See, paragraph 2, *supra.*)

7. Respondents state that Dr. McFarland questioned the validity of the California Achievement Test scores petitioner made, (Brief, p.11), citing Tr. 466-67. Their statement is a misstatement of fact.

The transcript clearly shows that regarding the GED and California Achievement Test scores, Dr. McFarland was asked a hypothetical question which did not consider any subsequent formal training, including night school. (Tr. 467, 475). The record shows that petitioner attended night school before taking the GED test, (Tr. 137), and the record further shows that it was not known whether petitioner took the California Achievement Test before or after attending night school. (Tr. 141).

To state as respondents have stated is pure conjecture.

8. Respondents claim Dr. McFarland testified to the effect that:

> ". . . inasmuch as Dupas had been purposefully and specifically tutored both for the qualifying California Achievement Test and the subsequent GED test, that such undoubtedly had a significant influence in the scores Dupas attained therein. Tr. Vol. IV, pgs. 475-477." (Brief. p. 11).

This is a misstatement of the testimony. The question asked Dr. McFarland and his answer is as follows:

> "Q. Let's consider it across the board, if somebody specifically and expressly and purposefully tutored for a test, he's going to get better results in that test than would perhaps his academic background afforded him than if he wasn't specifically tutored for it?
>
> "A. That makes sense to me, yes, sir.
>
> "Mr. Selman: Thank you." (Tr. 477).

9. Respondents fail to state in their scathing personal attack on petitioner (Brief, pp. 11-17), that:

a. Petitioner was arrested only once after the burglary charge.

b. Petitioner struck his wife with a gun once.

c. Petitioner was paroled from the Louisiana State Penitentiary on his burglary conviction.

d. Petitioner was granted a pardon by the Governor of Louisiana of the burglary conviction.

e. Petitioner voluntarily committed himself to the Louisiana State Hospital at Mandeville.

10. Respondents claim that petitioner "split her [petitioner's wife's] head open with a gun" is a misstatement of the testimony. (Brief. p. 12).

On this point petitioner's wife testified on cross-examination by Mr. Selman as follows:

"Q. Now, in 1969 you are aware that he was confined and admitted to the Southeast Louisiana Hospital in Mandeville?

"A. Yes, I went with him. We had an argument a few days before and it resulted in him hitting me and beating me and he realized that he needed some sort of help. He went down himself and committed himself. We went through quite a bit so he could get into Mandeville. We went to Charity Hospital and there was going to be a waiting list so we went to a private psychiatrist and they referred him to the mental health clinic and they expedited matters and I went with him. He did it himself." (Tr. Vol. V-35-6).

11. Respondents' claim that petitioner attempted to kill his two year old child is a misstatement of the testimony. (Brief. p. 12).

Petitioner's wife testified at the trial on cross-examination by Mr. Selman as follows:

"Q. And there was also an episode where he attempted to do away with your daughter, isn't that true?

"A. He was — this happened the same night [*i.e.*, the same night that petitioner struck her]. He was real strange that night. I had left. I was tired of his not working and being, you know, like he was so I left. And he decided that he wanted to kill himself and everyone else. This is one of the facts that led up to him going to Mandeville. He knew he needed help." (Tr. Vol. V, p. 36).

Cases Cited By Respondents On Damages

Petitioner first observes that the cases cited by respondents in their Brief, pp. 18-22, are comparatively old. Petitioner, on the other hand, cited cases decided as recently as 1977. Inflation and changed economic conditions may be considered in awarding amounts for general damages. *Goutierrez v. Travelers Insurance Co.*, 107 So.2d 847, 852-3 (La. App. 1959); *Prine v. Continental Southern Lines*, 71 So.2d 716, 723 (La. App. 1954).

In *Guidry v. Canal Insurance Company,* 313 So.2d 860 (La. App. 1975) the court held that plaintiff's injury had stabilized to what would be no more than a nagging back ache. (at p. 682). Plaintiff's paralytic ileus condition presumably (the opinion is unclear) lasted only from the time of the accident, September 24, 1971, to his release from the hospital October 7, 1971.

In *Howard v. Scandalito,* 333 So.2d 657 (La. App. 1976), the trial court, contrary to what respondents are reporting to this Court, awarded $50,000.00 for general damages for injuries (sustained in a second accident), which award was affirmed by the Court of Appeal. The distinguishing feature of the *Howard* case to the case at bar is that Mr. Howard had suffered severe brain damage in the previous accident. Further, his attending physicians attributed the cause of most of his injuries to the first accident and not to the second accident. (at p. 661).

From reading the reported case, it appears that Mr. Howard's condition of being "senile, not oriented as to date or time, not able to do simple addition or subtraction" was temporary.

In *Watts v. Town of Homer,* 301 So.2d 729 (La. App. 1974), the award for general damages was $150,000.00, compared to petitioner's award of $50,000.00. Additionally, the injured person in *Watts* was a seventeen month old child. She was twelve years old, as claimed by respondents, at the time of the appeal. The

extent of the injuries of small children are difficult to determine.

In *Smolinski v. Taulli,* 285 So.2d 577 (La. App. 1974), writ ref., the Court of Appeal stated that the plaintiff's physicians were unable to determine the extent of damage. (at p. 579). The Court nevertheless awarded $75,000.00, as compared to $50,000.00 awarded in the instant case. As in *Watts v. Town of Homer, supra.,* the injured person was an infant.

In *Wright v. Romano,* 279 So.2d 735 (La. App. 1973), writ ref., the distinguishing factor is that the plaintiff in *Wright* did not suffer brain amputation or paralysis, as did petitioner herein. Additionally, petitioner was awarded $85,000.00 in 1973, as compared to petitioner's award of $50,000.00 in 1978, for injuries that were not as serious as those suffered by petitioner.

In *Cline v. Ware,* 271 So.2d 587 (La. App. 1973), petitioner agrees that the plaintiff in that case suffered severe injuries. However, respondents fail to inform this Court that the Supreme Court of Louisiana granted writs to determine the adequacy of the amount of the award. *Cline v. Ware,* 274 So.2d 708 (La. 1973). On checking the Supreme Court of Louisiana record, (No. 53277), it was discovered that on June 14, 1973, the appeal was dismissed on joint motion. Presumably, plaintiff and defendants resolved their differences, undoubtedly for an award much higher than that made by the Court of Appeal.

In *Wood v. State Department of Highways*, 338 So.2d at 739 (La. App. 1976), writ ref., in affirming an award of $100,000.00, the Court of Appeal stated:

> "While we find the award *on the low side*, we are unable to conclude that the trial court's large discretion in these matters has been breached. We therefore affirm the amount of the award assessed by the trial court." (at p. 740). (emphasis added).

IV.

A CERTIFICATE OF SATISFACTION DOES NOT PRECLUDE AN APPEAL.

All petitioner did in executing a Satisfaction of Judgment was to acknowledge payment of the judgment, plus interest. It does not act as a release or dismissal. It merely terminates the accrual of interest, and precludes petitioner from collecting the same amount twice.

Accordingly, respondents' contention should be rejected.

V.

CONCLUSION

Petitioner submits that in the instance where a fully briefed argument on state constitutional grounds applies to federal constitutional grounds, as in the instant case, the citing of the federal constitutional issues to the state court through footnotes that incorporates the fully briefed argument adequately and properly raises the federal constitutional questions in the state court.

Respondents claim there were adequate grounds for the Supreme Court of Louisiana to refuse petitioner's petition for writ of certiorari but have not cited those grounds. The Supreme Court of Louisiana gave no reasons for its denial.

Petitioner's argument that the award of $50,000.00 for general damages is the result of unconstitutional actions, reasons, rationale, and theories is supported by respondents' Brief filed in this Court. Rather than argue the merits and law of petitioner's injuries and the deficits caused by his injuries, respondents devoted page after page to an attack on petitioner's character, morals, and lifestyle. Respondents are consistent. Their strategy of attacking petitioner personally, as shown in their Brief before this Court, has been their strategy throughout this case, beginning in the trial court.

Petitioner submits that the Satisfaction of Judgment is nothing more than just that, *i.e.*, a certificate that respondents have paid the judgment rendered against them. Nowhere therein is there any mention of any restriction of petitioner's right to appeal, nor is there any mention therein that petitioner's case is dismissed.

Petitioner reiterates his previous argument that the Louisiana Court of Appeal has so far departed from the well-settled rules and tests applicable to damages in tort law which have been laid down by the Louisiana statutes and the Supreme Court of Louisiana, and the Supreme Court of Louisiana has so far sanctioned such a departure by the Court of Appeal by denying petitioner's Petition For Writ, as to call for an exercise of this Court's power of supervision. See, Rule 19, Supreme Court Rules.

In none of the cases on damages cited by petitioner in his Petition For Writ Of Certiorari to this Court, nor in the cases on damages cited by respondents in their Brief before this Court, was there any mention of character, lifestyle, criminal activity, morals, etc. Further, undersigned counsel has never seen any mention of such factors in any other reported Louisiana case on damages, and has heard of none, until the instant case.

Clearly, these rules and tests laid down by the Louisiana Court of Appeal in the instant case have never been applied before and undoubtedly will never be applied again.

Petitioner submits that he has been the victim of invidious discrimination of a shocking nature. Only this Court has the power to right the terrible injustice handed to petitioner.

Petitioner urges this Court to grant Certiorari, require that this case be briefed and argued, and see for itself from the transcript of the testimony and the documents admitted in evidence the true facts of this case.

If this Court would do so, petitioner is confident that this Court will remand this case to the Supreme Court of Louisiana and order that Court to decide the question of damages consistently with constitutional principles, both state and federal.

Respectfully submitted by,

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March 9, 1979

VI.

CERTIFICATE

I certify that I served the foregoing brief in reply to respondents' brief in opposition to petition for writ of certiorari on defendants by mailing or delivering three copies of same to James L. Selman, II, Esq., Attorney at Law, 28th Floor, 225 Baronne Bldg., New Orleans, Louisiana 70112, and Thomas P. Anzelmo, Sr., Esq., Assistant City Attorney, City of New Orleans, 1300 Perdido Street, New Orleans, Louisiana 70112, on March 9, 1979.

GERALD P. AURILLO

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78 - 1157

ROBERT M. DUPAS, JR.,
Petitioner,

versus

CITY OF NEW ORLEANS, TRAVELERS INSURANCE COMPANY, and WILLIAM O. BROWN,
Respondents

REPLY BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. 78-1157

ROBERT M. DUPAS, JR.,
Petitioner,

versus

CITY OF NEW ORLEANS, TRAVELERS INSURANCE COMPANY, and WILLIAM O. BROWN,
Respondents.

REPLY BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

Respondents, City of New Orleans, Travelers Insurance Company and William O. Brown pray that the writ of certiorari sought by petitioner, Robert M. Dupas, Jr., to issue from the Supreme Court of the United States to review the opinion and judgment of the Louisiana Court of Appeal, Fourth Circuit, rendered June 30, 1978, and the denial of petitioner's Petition for Writ of Certiorari to the Supreme Court of Louisiana dated October 26, 1978, be refused and denied.

QUESTIONS PRESENTED

I. Whether petitioner heretofore raised or asserted any federal issue or question in the state court proceedings prior to petitioning the Supreme Court of the United States to

issue a writ of certiorari herein.

II. Whether the judgment of the Louisiana Court of Appeal, Fourth Circuit is supported by independent and adequate grounds under Louisiana state law as to preclude the view by the Supreme Court of the United States.

III. Whether the award of damages to petitioner by the Louisiana Court of Appeal, Fourth Circuit, is fair and adequate and therefore not violative of the provisions of the Fourteenth Amendment of the United States Constitution.

IV. Petitioner is precluded from pursuing any further appellate process by reason of his having accepted and received monies totally and completely satisfying the judgment of the Louisiana Court of Appeal, Fourth Circuit and his counsel having executed certificates of satisfaction.

STATEMENT OF THE CASE

The relevant facts as set forth in petitioner's statement of the case in his petition for writ of certiorari is correct and accurate, except that the total award, exclusive of expert witness fees, of the Louisiana Court of Appeal, Fourth Circuit, is $173,511.60, not $172,461.60 as indicated in petitioner's statement of the case.

ARGUMENT

I.

The extent of the United States Supreme Court's power to review decisions of state courts is set forth in 28 U.S.C.A. § 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . .
>
> (2) . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Supreme Court has rigidly adhered to the premise that federal constitutional issues raised for the first time on review of state court decisions will not be considered. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161 (1969); *Safeway Stores, Inc. vs. Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334, 79 S. Ct. 1196 (1959); *State Farm Mutual Automobile Insurance Co. vs. Duel*, 324 U.S. 754, 65 S. Ct. (1945); *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875). Thus, a federal question will be reviewed by the Supreme Court only if it has been first drawn in question before the state court.

In the present case, it seems highly unlikely that the pe-

titioner properly asserted his federal constitutional claim to the Louisiana Supreme Court. A survey of the petitioner's pleadings indicates that the only references to any "federal constitutional issue" are found in four footnotes added to the text of the petition for a writ of certiorari to the Supreme Court of Louisiana. These footnotes contain a cursory legal conclusion that the decision of the Louisiana Court of Appeal, Fourth Circuit,"also" violate the Fourteenth Amendment of the Constitution of the United States. This contention is unsupported by any argument made or authority cited in the main body of the petition.

The Supreme Court of the United States has unequivocally held that such cursory conclusions are not sufficient to constitute the assertion of a federal question to a state tribunal. *Harding v. Illinois*, 196 U.S. 78, 25 S. Ct. 176 (1904). In that case, the petitioner sought review of a state court judgment and as basis for his claim asserted that his federal constitutional rights had been violated. In reviewing the petitioner's pleadings at the state level, the Supreme Court found only two instances wherein the petition raised federal constitutional issues. In both instances the references amounted to mere conclusive statements that a state statute violated the Constitution of the United States. The issues thus raised by the petitioner in the *Harding* case, *supra*, closely resemble those raised by the petitioner in the case *sub judice*. In dismissing the petitioner's writ in *Harding, supra*, the Supreme Court concluded that such cursory statements unsupported by authority or argument were not sufficient to support a contention that federal constitutional issues had been raised before the State tribunal and thereby decided upon. Based upon the court's holding in *Harding, supra*, the Supreme Court should deny the petitioner's writ in

the present case.

II.

The Supreme Court's jurisdiction to review state court cases that involve federal questions has been limited by a number of rules that have been developed since the enactment of Section 25 of the First Judiciary Act in 1789. One such rule is commonly referred to as the "independent state ground" rule. Basically, the sum and substance of that rule is that the Supreme Court will not review a federal question if the state judgment is supported by independent and adequate grounds under state law. Wright, Miller, Cooper, Gressman. *Federal Practice and Procedure*, Volume 16. § 4019. Thus if there is state law sufficient to support the decision of the highest state court, the Supreme Court should refuse to review that decision.

This doctrine was elaborately discussed by Justice Miller in *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875). The rule was stated in somewhat different terms by the court in *Henry v. State of Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965) as follows:

> "Under the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have power to review judgments on questions of state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions." 85 S. Ct. at 567.

No case has been found wherein the Supreme Court refused to review a state court decision regarding damages.

However, in view of the fact there must be some support in Louisiana law for the Louisiana Supreme Court's refusal of the petitioner's writ in this case, the Supreme Court should apply this doctrine and deny the petitioner's writ for certiorari.

III.

Petitioner contends that the Louisiana Court of Appeal, Fourth Circuit, did embrace and apply a so-called "ordinary man" concept in assessing damages herein rather than adhering to a long standing rule in the jurisprudence of Louisiana that the courts consider the unique and peculiar circumstances of each individual case in deciding damages. Paradoxically, plaintiff both misconstrued the context of the single "ordinary man" reference in the opinion of the Court of Appeal, as well as the mode and method of the Court of Appeal in awarding damages herein. Petitioner expends a great deal of effort and verbage in his brief in attacking the examination and exploration of the circumstances of the background and life style of petitioner by the Court of Appeal in its damage evaluation, thence and thus proceeding full circle in arguing that the Court should have in fact looked upon petitioner as any ordinary man, ignoring the type of person he was and the jaded life style he pursued.

It was precisely in this context that the Court of Appeal made the "ordinary man" reference, that is, pointing out that prior to the accident, petitioner was anything but an ordinary productive and responsible citizen. In Louisiana, damages in personal injury cases are strictly compensatory. Thus the Courts have no choice but to examine the pre-injury and post-injury circumstances of each personal injury claimant in

an effort to determine damages that will adequately and properly compensate him for his suffering and deprivations causily resulting or occasioned by the tortuous event.

Respondents concede petitioner indeed suffered a serious head injury from which he has significant residuals. Dr. David G. Kline, petitioner's initial attending neurosurgeon, described same as a closed head injury with contused central brain lobe. Dr. Kline carried out a partial lobectomy of the left temple lobe, removing the most swollen and contused portion of the brain which amounted to eight to ten per cent of the brain overall. Tr. Vol. II, pgs. 24, 29, 34, 38. His residuals have been detailed as weakness and awkwardness of the right arm and right leg, expressive aphasia (speech impediment), some degree of intellectual and memory impairment, and certain personality changes (personality flattening). On the other hand, the medical evidence shows to an equally definitive degree that plaintiff made a remarkable recovery from his injury, that he is physically and mentally functional, and continued to exhibit improvement right up to the time of trial. The ultimate opinion of Dr. Kline was that petitioner was probably able to carry out a desk job in a clerk's capacity or do cleaning work, and would probably do well if he in fact had some type of menial job. Tr. Vol. II, pgs. 25-27, 34-40, 46. This was also the opinion of Dr. Patricia Cook, a neurologist who attended petitioner commencing shortly after his surgery by Dr. Kline and throughout his initial primary rehabilitative regimen. Tr. Vol. IV, pgs. 419-424, 430. Significantly Dr. Kline made no mention in the entire course of his testimony of the petitioner's suffering any degree of pain or discomfort by reason of his injury, or that he prescribed any medication for pain at any time petitioner was under his care. Dr. Cook specifically

stated that while she was seeing the claimant he was not in pain and she seriously doubted that he experienced much if any pain following brain surgery. Tr. Vol. IV, pg. 415.

The claimant was also seen and evaluated by Dr. Raeburn Llewellyn, neurosurgeon, and Dr. Max Johnston, a meurologist;psychiatrist. Dr. Llewellyn saw the claimant October 18, 1974 and just prior to trial on March 18, 1976. His findings were basically those described by Dr. Kline and Dr. Cook (Vol. IV, pgs. 520-524, 527-528), though he was a bit more pessimistic in his view as to whether claimant could hold down a job. Tr. Vol. IV, pg. 526. It should be noted that on the two occasions Dr. Llewellyn saw the petitioner, he had no complaints of headaches, dizziness or other health problems and reported that he was eating and resting well. Tr. Vol. IV, pgs. 528-529.

Petitioner saw Dr. Johnson on November 18, 1974, on June 9, 1975 and on March 22, 1976. His findings and opinion basically corresponded to those of Drs. Kline, Cook and Llewellyn. Tr. Vol. III, pgs. 268-276.

Most interesting are the results of certain post-accident psychological and intellectual tests administered to petitioner as compared to similar pre-accident evaluations petitioner underwent. One Charles Kilbert of the Basic Education and Department of Continuing Education of the Orleans Parish School Board was called to testify on behalf of plaintiff. Mr. Kilbert offered testimony regarding the General Educational Developmental certificate awarded petitioner towards his obtaining a high school equivalency diploma. The record shows that at age 15 or 16, petitioner left grammar school after having repeated the sixth grade two or three times, and

having just commenced the seventh grade. Subsequent thereto, the only additional formal education he had consisted of a two month course at Colton Junior High School preparatory to taking the G.E.D. test in December, 1972; a one month math course at Delgado Vocational College in July and August, 1972; and a four month course in drafting at Delgado Vocational School from August to December, 1972. See exhibits Def. I, II, III; exhibits P-15 through 17 and P-22; Tr. Vol. II, pgs. 137-138. The record further shows that in early 1965, while serving a term in the Louisiana State Penitentiary at Angola for burglary, petitioner underwent both intelligence (I.Q.) and achievement grade level testing. His intelligence I.Q. rated at 80 or at the eleven percentile level and his verbal I.Q. at 107 or at the 67 percentile level giving him an overall I.Q. score of 97. On achievement testing, his reading score was converted to an eighth grade, eighth month rating; his spelling to a sixth grade, sixth month rating; and his arithmetic to a sixth grade, second month rating. These results gave him an overall sixth grade level achievement score. Exhibit Def. II.

Subsequent to the two month preparatory course for his GED test, but before taking the GED, claimant took a qualifying test known as the California Achievement Test. Mr. Kilbert testified that on this test he scored an overall grade equivalency of 13, or first year in college. He had a reading placement of 13th grade; arithmetic placement of 12th grade, third month; and language placement of 13th grade, fourth month. Tr. Vol. II, pgs. 138-141. Subsequently, petitioner took the GED test which consists of five parts and is graded under a most peculiar method. Tr. Vol. II, pgs. 125-130. Rather than undertaking to interpret and corrolate his GED scores, it need only be pointed out that in three

of the five test areas, Dupas scored in the lower fifty percentile of the test takers nationwide. Tr. Vol. II, pgs. 128-129, 141-142. Mr. Kilbert was called upon to compare petitioner's test results against the optimum ranges of each test, he was forced to admit he was not a tester, scorer or interpreter, and was not able to give such corrolation. Tr. Vol. II, pgs. 143-144.

Also testifying in this area was Robert McFarland, a clinical psychologist, who on two different occasions, tested and evaluated petitioner. The first of these testings was carried out on October 30 and November 5, 1974. Mr. McFarland was of the opinion that petitioner exhibited brain damage level scores on such tests as seashore rhythm, speech and sentence perception. On the other hand, his intelligence or I.Q. overall score was 90 (based on a verbal score of 88 and a performance of 94) which fell in the normal intelligence range. In achievement testing,converted to grade level, petitioner had a reading score of seventh grade, ninth month, spelling fourth grade, sixth month, and arithmetic sixth grade, first month.

The second group of testings by Mr. McFarland were carried out on March 25, 1976. On this occasion, petitioner had a slightly lower intelligence score than two years' prior, but his achievement scores of eighth grade, third month reading, fifth grade, fifth month spelling, sixth grade, first month arithmetic, were higher.

Putting aside momentarily the California Achievement Test results, it is clear that in the area of intelligence quotion and achievement testing there is little if any significant difference in the levels attained by petitioner when he was

tested while incarcerated in Angola Prison in 1965 and those which he attained on two different series of testings by Mr. McFarland in 1974 and 1976, following the accident which is the subject of this litigation. It is thus clear that the claimant's head injury has resulted in little or no reduction intellectually or in the area of mental achievement on the part of petitioner. As to the results of the California Achievement Test, Mr. McFarland noted and commented upon the significant disparity between such and the levels petitioner attained on the McFarland-administered testings. Tr. Vol. IV, pgs. 458–460. However, when Mr. McFarland became fully appraised, while on the witness stand, of the degree of petitioner's formal education prior to taking the achievement test while in prison in 1965, and the scores he made on the tests he took in prison, and of the two months' special preparation petitioner underwent before taking the California Achievement Test, Mr. McFarland openly questioned the validity of the latter. Tr. Vol. IV, pgs. 466-467. He went on to clearly indicate that the petitioner's test scores while in prison and those on the tests administered by him (McFarland) since the time of petitioner's injury were consistent and in line with the degree and extent of petitioner's academic background. Tr. Vol. IV, pgs. 468-469. Finally, Mr. McFarland testified that inasmuch as Dupas had been purposefully and specifically tutored both for the qualifying California Achievement Test and the subsequent GED test, that such undoubtedly had a significant influence in the scores Dupas attained thereing. Tr. Vol. IV, pgs. 475-477.

Respondents concede for purposes of argument that residuals of the nature and degree petitioner has from his injury might be expected to radically effect the life style and output of an average law-abiding, productive, socially integrated

and responsible citizen. However, as respondents have heretofore suggested, the record shows that prior to the accident of October 15, 1973, Robert M. Dupas, Jr. was the literal antithesis of such average citizen.

After repeating the sixth grade two or three times, petitioner finally left school permanently some time during the course of the seventh grade at age fifteen. See exhibits Def. II and III. In 1964, he was arrested for vagrancy. In September of the same year, he was arrested for simple burglary, a charge on which he was later convicted and sentenced to Angola Prison in 1965. See Exhibit Def. II.

The records of the Southeast Louisiana Mental Hospital in Mandeville, Louisiana, were subpoenaed and introduced into evidence as Exhibit Def. III. These show that petitioner's mother, during an interview after petitioner's admission to that institution in late March, 1969, disclosed that petitioner had been mentally ill since age 13, having become antagonistic and undisciplined at age 10. He had developed feelings that people were leechs, and from age 13 had led an unhappy existence. She had often considered seeking help for him, but he threatened suicide each time it was suggested.

Petitioner's wife, Marian, was also interviewed at the Mandeville Hospital. She related that petitioner had been abusive to her throughout their marriage, most recently having split her head open with a gun at the same time attempting to kill their two year old child. He had no interest throughout their marriage, keeping company with criminal types and never holding a job more than six months. As a result they had lived in abject poverty throughout their marriage, often being without electricity or gas. Petitioner's

wife went on to say that petitioner underwent protracted periods of depression, often commencing just after New Year's and lasting midway through the ensuing year. He raved daily, most frequently at midday and late afternoon. He was unhappy, felt inadequate and frequently threatened suicide.

The Mandeville Hospital records further show that while petitioner was interned there, a detainer was placed on him at the request of the Jefferson Parish, Louisiana, authorities for possession of stolen property.

The diagnosis on Dupas at Mandeville Hospital was that he was a paranoic-depressive with antisocial traits and drug dependent. Petitioner himself admitted while hospitalized that he lacked ambition, had groundless suspicions about his wife, and for years had stolen and burglarized. He exhibited sociopathic traits with depression and paranoia. It was suspected by those who evaluated him that the recent incident involving his wife and child constituted a psychotic episode. He was discharged from the hospital May 16, 1969, still on medication, and placed in the hands of the St. Tammany Parish authorities for transfer to Jefferson Parish on the stolen property charge. On discharge, he was to continue his medication and his prognosis was classified as "guarded". See Exhibit Def. III.

Petitioner's work and earnings records between the time he left grammar school at age 15 to the time of his accident are by any standard a disgrace. The earliest employment he seems to have had was at Avondale Shipyards, Inc. The Avondale records offered in evidence (see Exhibit P-21) showed that from April 12, 1962 to January 29, 1963, and

April 29 to June 21, 1963, he worked there as an electrician's helper. At the end of the first period he was discharged for having been absent from work for several months. At the end of the second period, he quit for alleged illness. The Avondale records also contain a notation dated May 23, 1963 that petitioner was not a desirable employee and should not be rehired. Nonetheless, several years later he worked one further brief period at Avondale, this from June 26 to August 7, 1973, once again as an electrician's helper. He quit purportedly to return to school. See Exhibit P-21.

Petitioner's tax returns for the years 1966 through 1969, both inclusive, and for 1972 and 1973 were introduced and received in evidence. See Exhibits P-37 through P-42. These showed that in 1966, petitioner earned a total of $1,085.16 at four different places of employment; that in 1967, he earned $1,335.95 at three different places of employment; that in 1968, he earned $1,939.78 at one place of employment; that in 1969, he earned $2,234.36 in one place of employment; that in 1972, he earned $1,071.25 at two different-places of employment; and that over the nine and a half months of 1973 preceding his accident of October 15, petitioner earned $3,518.03 at three different places of employment.

While petitioner's wife, Marian, and his father, Robert, Sr., attempted in their testimony to minimize petitioner's problems as well as their own problems with petitioner prior to his admission to the mental hospital in Mandeville, and also attempted to portray petitioner as having "turned over a new leaf" following his discharge therefrom, the record supports them in neither instance. Petitioner's work and wage records before he was institutionalized in Mandeville in 1969 clearly

placed Dupas and his family at the sub-poverty level. Following his release from the Mandeville hospital, he worked part of 1969 and part of 1970 as a truck driver at a maximum attained wage of $2.10 per hour. When he left this employment in July, 1970, it was for alleged personal reasons, and he did not indicate that he had any other employment. Tr. Vol. III, pgs. 259, 263-267; exhibit P-19. Apparently for the remainder of 1970 and the whole of 1971, he was unemployed, there being no evidence of any employment or any earnings for that period. In 1972, he worked briefly at Cozo's Electric earning $1,052.00, and apparently only a matter of a few hours at Wallace Drennan,Inc. where he earned $19.75. In 1973, he continued briefly at Cozzo's, but left there to go to work at Halter Marine where he was employed less than four months earning $2,061.69. Exhibits P-20, P-41, P-42. After leaving Halter, he returned for approximately five weeks to Avondale Shipyards, earning $1,120.34. He terminated at Avondale Agusut 7, 1973. Exhibit –21. When he left Avondale on this occasion, he indicated it was because he was returning to school, but he did not in fact do so nor did he obtain any other employment up to the time of his accident some two and a half months later. Exhibit P-21; Tr. Vol. V, pgs. 35, 43, 44. When he was injured on October 15, 1973, neither he nor his wife were employed. Tr. Vol. V, pgs 44-45. While Dupas was employed for part of 1970, he had by August or September of that year (if not earlier) resumed his drug habit. His pre-accident record at Charity Hospital of Louisiana at New Orleans (see Exhibit Def. I) reflects that in September, 1970, petitioner was hospitalized for viral (serum) hepatitis which he contracted when he borrowed an unsterile syringe from a friend some six weeks earlier for a heroin injection. The friend had apparently exhibited signs and/or symptoms of the disease at the time

petitioner had borrowed the needle from him.

The troubles between Dupas and his wife clearly continued through the early 1970's. They went through further periods of separation, one being of six months duration in 1972. Tr. Vol. V, pgs. 29, 40. The same basic underlying problem existed for them, that being her continued and his periodic unemployment and the resultant lack of finances. Tr. Vol. V, pgs. 40-45. Some insight into the type of irresponsible person petitioner was and had always been prior to the accident can be gleaned from the testimony of his wife, Marian, in respect to petitioner's acquisition of the motorcycle he had ridden to the scene of the accident involved herein. That motorcycle had been purchased in May, 1973 with funds realized from the sale of bonds Mrs. Dupas had inherited from her father. Tr. Vol. pgs. 49-50. Taking into consideration that from the time petitioner was discharged from the Mandeville mental hospital in May, 1969, to his purchase of the motorcycle in May, 1973, the combined income of the Dupas' averaged somewhere between $1,000.00 and $1,500.00 per year, as well as their general circumstances and mode of life, the utilization of the funds realized from the sale of the inherited bonds for the purchase of such a non-essential luxury item as a motorcycle does outrage to any concept of family or individual responsibility.

In summary, the evidence overall portrayed petitioner from a very early age to the time of his accident as a consistently erratic, irresponsible, criminally prone, violent, drug dependent, disillusioned, depressed, paranoic, ambitionless and nonproductive man-child. While the accident of October 15, 1973 resulted in a serious, partially disabling injury, there is no evidence that he has experienced significant or prolonged pain and suffering, physically or mentally, and there is ample evidence that he is a much less truculent, more facile and easier to deal with individual, albeit due to his injury.

Admittedly a dispute exists between the medical and rehabilitative experts who testified as to whether petitioner is now able to undertake any form or means of gainful employment, but respondents submit that this controversy arose by and between petitioners' own witnesses, not any called or relied upon by respondents. Consequently, petitioner has failed in his burden to establish by preponderance of the evidence that he is physically and/or mentally incapable of employment. *Viator vs. Gilbert*, 216 So. 2d 821 (La. Sup. Ct., 1968); *Edwards v. Sims*, La. App. (4th Cir.) 1974, 294 So. 2d 611.

Respondents respectfully submit that the award of $50,000.00 in general damages to petitioner is not merely adequate, but generous in light of the overall circumstances and the hereinafter cited case authorities from the Louisiana jurisprudence. The medical evidence is conclusive that petitioner suffered little if any pain or discomfort from his injury. While there is evidence that claimant realizes or is cognizant that the accident has resulted in some degree of mental deficiency on his part, there is absolutely no evidence that this realization is agonizing or tormenting to him, or causes any emotional reaction whatsoever. Insofar as any claim for loss of cohabitation or companionship with his wife and children, the evidence is abundant that claimant's marriage was an on again, off again relationship, and that he had little or no interest in being with or caring for his family prior to the accident. There were long periods of separation between he and his wife, and even during those periods

when they were together the association produced more combat than comfort.

Petitioner's contention that the award of $104,249.17 for impairment of future earning capacity is inadequate is equally baseless. The Court of Appeal based such award on annual assumed earnings of $4,464.98. The record shows that in no year of his life did petitioner ever have earnings approaching such figure, and in most years he didn't earn even half that amount. Respondents thus submit that the award by the Court of Appeal to petitioner for loss or impairment of future earning capacity was more than adequate.

The cases submitted herein below by respondents represent an exhaustive effort to uncover and cite to this Honorable Court recent decisions wherein the injuries and residuals are at least as serious and enduring and the damages as extensive or more so as those suffered by and sustained to petitioner herein.

In *Guidry v. Canal Insurance Company*, La. App. (1st Cir.) 1975, 313 So.2d 860, plaintiff was injured in a bus accident. His injuries consisted of a compression fracture of the 12th thoracic vertebra with accompanying low back strain and low back tissue damage, and a fractured clavicle or collarbone. His pain was severe and his convalesence was complicated by the development of paralytic ileus, a condition where the intestinal tract ceases to function and the plaintiff had to be fed intravenously and waste products of his system removed through tubes inserted in his body. Plaintiff left school in the third grade at age 14 and later completed his education in the service. He completed a vocational training course in carpentry and pursued this avocation until the time of his accident in 1971. At that time he was 49 years of age. As a man of limited intelligence, his capabilities were measured by and limited to physical achievement. His injuries prevented his normal physical expressions which in turn resulted in severe mental depression. Being incapable of earning by reason of his limited mental resources and being unable any longer to perform the physical labors for which he was trained and experienced, plaintiff suffered severe economic loss. The record shows that in 1970, the year preceding his accident, plaintiff earned $8,263.00 and in 1971 up to the time of his injury on September 24, his earnings were $7,168.00. The Louisiana Court of Appeal, First Circuit, affirmed the trial court's total award of $79,806.90, this including past and future lost wages of $64,140.00.

The case of *Howard v. Scandalito*, La. App. (4th Cir.) 1976, 333 So.2d 657, involved personal injury claims of both a husband and a wife. The injuries suffered by the husband were similar to those suffered by Dupas herein. These included organic brain damage, brain disfunction and implied brain damage. These left plaintiff nearly senile, not oriented to date or time, not able to do simple addition or subtraction, weakness on the right side of his face, severe depression, increased loss of function of the frontal lobe of the brain, emotional difficulty and personality problems. Plaintiff had suffered a prior cerebral concussion affecting the left side of the brain and the second accident caused a moderate to severe aggravation of the decreased brain functioning he had experienced therefrom. Plaintiff suffered serious impairment of his intellectual capacity and was considered totally unemployable. The Louisiana Court of Appeal, Fourth Circuit found that the total award of $100,000

to the plaintiff husband was not excessive but should be reduced by $50,000 due to the involvement in the overall mental picture of the effects of the earlier cerebral concussion.

In the case of *Watts v. Town of Homer*, La. App. (2d Cir.) 1974, 301 So.2d 729, a 12-year old girl was seriously injured by the collapse of a swing on town property. Her injuries included a fractured skull, severely swollen brain with brain edema and bruising, high fever and damage to the lower portion of the brain. The left side of her body was partially paralyzed and she had recurring convulsions. Brain surgery was performed to check for blood clots. The evidence showed that she was a normal child for her age prior to the accident. However, she was subsequently found to have an I.Q. of 50, recurring convulsions, paralysis and weakness of the left side, unable to perform any type of chores, and required support for the rest of her life, with continuous supervision and with probable institutionalization along with frequent medical attention and medication. The trial court award of $250,000.00 was reduced to $150,000.00 by the Louisiana Court of Appeal, Second Circuit, which felt there was no accurate way to assess any possible future loss of earnings or reduction in life expectancy.

In *Smolinski v. Taulli*, La. App. (4th Cir.) 1974, 285 So.2d 577, writ refused 1974, a 19-month old child suffered severe brain injury and permanent brain damage from a fall from the landing of an apartment building stairway. As a result, the child became mentally deficient, with a dull or below average mentality. Her attending neurosurgeon testified that her problem was more in the integrated function of the brain rather than simply motor control which might cause paralysis, and that the trouble lay in the child's ability to learn, speak, talk, ability to think and perform, and emotional behavior. Interestingly, the *Smolinski* case followed the same judicial course as the instant case, the trial court finding in favor of the defendant, the Court of Appeal affirming and the Louisiana Supreme Court reversing and remanding to the Court of Appeal for fixing of damages. In *Smolinski* the Court of Appeal awarded $75,000 in general damages and $282.75 special damages.

In *Wright v. Romano*, La. App. (1st Cir.) 1973, 279 So.2d 735, writ refused 1973, a 14-year old girl suffered a comminuted fracture of the pelvis as well as fractures to the right scapula and the neck of the right humerus and multiple fractured teeth. She also suffered a severe cerebral contusion. As a result of the pelvic fractures she had a 10% permanent partial disability of the body as a whole, with a 15% limitation of movement in the right hip. As a result of the cerebral contusion she sustained permanent personality changes and mental deficiencies. Prior to the accident, she was described as a normal, healthy individual, but afterwards, she was found to have below average mental capacity, with a distinct possibility of post-traumatic epilepsy existing. A total award of $85,000.00 was made in this case.

The case of *Kline v. Ware*, La. App. (1st Cir.) 1973, 271 So. 2d 587, involved a 21-year old female who was a bride of two weeks when she was injured in an automobile accident October 27, 1968. Her injuries included contusion of the right lung, a fracture of the ramus of the left pelvis and a fracture of the transverse process of the fourth lumbar vertebra, loss of profusion of her kidney, a severe contusion of the cerebrum, brain stem and a possible intracranial hem-

orrhage. She remained in critical condition for a period of six weeks and her convalescence was described as a slow and painful process. Her residuals included retrograde amnesia, an unusual gait, and the possibility of future seizures. Her combined injuries resulted in the opinion of her attending physicians in a 25% disability of the body as a whole. There was no doubt that her lifestyle would be forever altered by the injuries. The Court of Appeal, First Circuit, reduced a $95,000 award by the trial court to $60,000 deleting an allowance for her loss of earning capacity. At the time of the accident, the plaintiff had recently left college to be married, but intended to return to pursue a degree toward becoming a commercial artist. The Court felt that an allowance for a reduction of earning capacity was too speculative under the circumstances.

Finally, in *Wood v. State Department of Highways*, La. App. (3rd Cir.) 1976, 338 So.2d 739, writ refused 1977, plaintiff, a 22-year old male, suffered serious and permanent disabling injuries in a motor vehicle accident. He was unconscious and on the critical list several days. He sustained a brain stem injury causing seizures and convulsions; contusions over his lower extremities, a fracture of the left elbow, and perineal nerve palsy resulting in a drop of his left foot, requiring a brace. During hospitalization he developed an ulcer which required plastic surgery. By hospital discharge his memory recall was very poor. He was considered totally disabled from returning to his occupation as a truck driver. In this instance the Court of Appeal found that the total award of $120,179.57 such including medical expenses of $10,179.57, lost earnings of $10,000 and $100,000 general damages was adequate.

IV.

Following the denial by the Louisiana Supreme Court of the petitioner's petition for writ of certiorari, petitioner, through his counsel, accepted and received monies from Travelers Insurance Company and the City of New Orleans, fully and completely satisfying all parts of the judgment of the Louisiana Court of Appeal, Fourth Circuit. His counsel executed certificates of satisfaction both in respect to Travelers Insurance Company and the City of New Orleans (see appendices A-1 and A-2), and these were filed into the record of the case and the docket marked satisfied. Respondents therefore submit plaintiff is now precluded from seeking a further appellate remedy herein and his petition for writ of certiorari to this Honorable Court should therefore be refused and denied.

CONCLUSION

By simply making cursory, one sentence footnote references to an alleged violation of the Fourteenth Amendment of the United States Constitution in his petition for writ of certiorari to the Louisiana Supreme Court, petitioner has not sufficiently heretofore raised any federal question or issue. Therefore, petitioner's petition for writ of certiorari to this Honorable Court should not be considered.

Further, the Louisiana Court of Appeal, Fourth Circuit, based its judgment on damages on adequate and independent grounds under Louisiana state law, and this Honorable Court should not undertake to revise such judgment and should therefore deny the petition for writ of certiorari of petitioner.

Further, that the rationale and basis of the judgment of the Louisiana Court of Appeal, Fourth Circuit, underlying its award of damages to petitioner are valid and correct, and there has been no violation or deprivation of any rights to which petitioner is accorded under the United States Constitution, particularly the Fourteenth Amendment thereof.

Finally, that petitioner is precluded from seeking any further relief in respect to this litigation by virtue of the fact that he has accepted and received funds from or on behalf of respondents fully and completely satisfying the judgment of the Louisiana Court of Appeal, Fourth Circuit, and his counsel of record has executed certificates of satisfaction in evidence thereof and the docket has been marked satisfied.

Respectfully submitted by:

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and William O. Brown

CERTIFICATE

I certify that I have served the foregoing reply brief for respondents, City of New Orleans, Travelers Insurance Company and William O. Brown to the petition for writ of certiorari of Robert M. Dupas, Jr. to the Supreme Court of the United States upon said petitioner by mailing or delivering three copies thereof to Gerald P. Aurillo, Attorney at Law, 3332 North Woodlawn Avenue, Metairie, Louisiana 70002 on the 21st day of February, 1979.

THOMAS P. ANZELMO, SR.

APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 581-139 DIVISION "B" DOCKET NO. 4

ROBERT M. DUPAS, JR.

VS.

CITY OF NEW ORLEANS, ET AL.

Filed: Jan. 3, 1979

FILED: DEPUTY CLERK

CERTIFICATE OF PARTIAL SATISFACTION OF JUDGMENT

I, as attorney of record for plaintiff, Robert M. Dupas, Jr., acknowledge and certify that that portion of the judgment rendered in the above entitled and numbered cause by the Court of Appeal, Fourth Circuit on or about June 30, 1978, for which defendants, the City of New Orleans and William O. Brown, are responsible and liable, that is, the sum of ONE-HUNDRED NINETY-ONE THOUSAND, ONE-HUNDRED SIXTY-THREE AND 32/100 ($191,163,32) DOLLARS, has been fully paid and satisfied.

New Orleans, Louisiana, this 29th day of December, 1978.

s/ Gerald P. Aurillo
GERALD P. AURILLO
3332 N. Woodlawn Avenue
Suite 103
Metairie, Louisiana 70002
Attorney for Plaintiff,
Robert M. Dupas, Jr.

SATISFACTION OF DOCKET

The above indicated portion of the aforesaid judgment has been fully satisfied and the sum above mentioned received by me, as attorney of record for and on behalf of plaintiff, Robert M. Dupas, Jr.; now, therefore, the Clerk of the Civil District Court is hereby authorized to mark the docket "satisfied" to the extent thereof as to defendants, the City of New Orleans and William O. Brown.

s/ Gerald P. Aurillo

GERALD P. AURILLO
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Suite 103
Metairie, Louisiana 70002
Attorney for Plaintiff,
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APPENDIX B

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 581-139 DIVISION "B" DOCKET NO. 4

ROBERT M. DUPAS, JR.

VS.

CITY OF NEW ORLEANS, ET AL.

Filed: Jan. 2, 1979

FILED: DEPUTY CLERK

CERTIFICATE OF PARTIAL SATISFACTION
OF JUDGMENT

I, as attorney of record for plaintiff, Robert M. Dupas, Jr., acknowledge and certify that that portion of the judgment rendered in the above entitled and numbered cause by the Court of Appeal, Fourth Circuit on or about June 30, 1978, for which defendant, Travelers Insurance Company, is legally responsible and liable, that is, the sum of THIRTY FOUR THOUSAND FIVE HUNDRED EIGHTY-FOUR AND 60/100 ($34,584.60) DOLLARS, has been fully paid and satisfied.

New Orleans, Louisiana, this 29th day of December, 1978.

s/ Gerald P. Aurillo
GERALD P. AURILLO
3332 N. Woodlawn Ave.,
Suite 103
Metairie, Louisiana 70002
Attorney for Plaintiff,
Robert M. Dupas, Jr.

SATISFACTION OF DOCKET

The above indicated portion of the aforesaid judgment has been fully satisfied and the sum above mentioned received by me, as attorney of record for and on behalf of plaintiff, Robert M. Dupas, Jr.; now, therefore, the Clerk of the Civil District Court is hereby authorized to mark the docket "satisfied" to the extent thereof as to defendant, Travelers Insurance Company.

s/ Gerald P. Aurillo
GERALD P. AURILLO
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Attorney for Plaintiff,
Robert M. Dupas, Jr.